

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

HEARING ON MOTIONS

October 24, 2019

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Matthew J. Oppenheim, Scott A. Zebrak, Jeffrey M. Gould,
and Andrew Guerra, Counsel for the Plaintiffs

Thomas M. Buchanan, Michael S. Elkin, Jennifer A. Golinveaux,
Thomas Patrick Lane, and Diana Hughes Leiden,
Counsel for the Defendants

1 THE CLERK: The Court calls case 1:18-cv-950, Sony
2 Music Entertainment, et al. versus Cox Communications, Inc., et
3 al. for a motion hearing.

4 May I have the appearances, please, first for the
5 plaintiffs.

6 MR. ZEBRAK: Good afternoon, Your Honor.
7 Scott Zebrak with the law firm of Oppenheim + Zebrak. With me
8 today at counsel table are my colleagues Matthew Oppenheim and
9 Jeffrey Gould.

10 Also in the courtroom today are a number of
11 colleagues from our firm on the far right, and a number of
12 client representatives behind me. We have Nathan Osher from
13 Warner Chappell. Sitting next to him, Carla Miller from the
14 UMG plaintiffs. And sitting next to Carla is Brad Cohen from
15 Warner Music Group. And then last, but certainly not least, is
16 David Jacoby from Sony Music.

17 THE COURT: All right. Well, good afternoon to all
18 of you. And your -- your IT person who is going to help you
19 out today, what's his --

20 MR. ZEBRAK: I apologize, Your Honor.

21 THE COURT: Yeah.

22 MR. ZEBRAK: Though he is facile with IT as well,
23 he's a lawyer with our firm as well, his name is Andrew Guerra.

24 THE COURT: All right.

25 MR. ZEBRAK: And with the Court's permission, we're

1 going to split up the arguments today where my colleague,
2 Matthew Oppenheim, will argue the summary judgment issues, with
3 the exception of ownership and Cox's pair of issues on
4 statutory damages, I'll argue those. And on the Daubert
5 motions, Jeffrey Gould will argue our defensive motion on
6 Mr. Lehr, and I'll argue the other two.

7 THE COURT: All right, that's fine. Thank you. All
8 right. Again, good afternoon to all of you.

9 Mr. Buchanan.

10 MR. BUCHANAN: Good afternoon, Your Honor.
11 Thomas Buchanan from the firm of Winston & Strawn on behalf of
12 the defendants.

13 With me at counsel table is Michael Elkin and Diana
14 Hughes Leiden. Also here is Thomas Lane and
15 Jennifer Golinveaux. And we are the ones that requested the
16 tech individual, who is here with us.

17 THE COURT: All right.

18 MR. BUCHANAN: And then we have two representatives
19 of Cox, Marcus Delgado and Kristen Weathersby from -- both
20 counsel with Cox. Thank you, Your Honor.

21 THE COURT: All right. Good afternoon to all of you.

22 All right. Well, by my count we're here to talk this
23 afternoon about the Tregillis, Lehr, and Feamster Daubert
24 motions, and then summary judgment motions as well. And
25 included in that, of course, is I think affirmative defenses,

1 but more part of the summary judgment motions.

2 And what I would like to do is start with the Daubert
3 motions first. I've read the pleadings. Obviously the BMG
4 case was tried a couple years ago and, you know, rulings were
5 made in that case that are relevant here.

6 So I've read the reports and the pleadings, and I
7 have some questions. I don't want you to go back through each
8 of your arguments, we'd be here until next week.

9 So I'm looking at, you know, 10 or 15 minutes of
10 argument, a response, we'll give the moving party the reply.
11 And keep moving that way. And then summary judgments after the
12 Daubert motions.

13 So why don't we start with Feamster, does that work?

14 MR. ZEBRAK: Yes, Your Honor.

15 THE COURT: All right, Mr. Zebrak.

16 So the \$64,000 question is, where did the spreadsheet
17 come from, right? The REV 00003444. So I know -- you know,
18 what's your position at this time?

19 MR. ZEBRAK: Sure. Sure. Well, vis-a-vis
20 Dr. Feamster's expert report, I'll answer that right now. And
21 I would also like to just bring to the Court's attention that
22 this is also the subject of a separate motion in limine outside
23 of the Daubert matter.

24 THE COURT: Okay.

25 MR. ZEBRAK: So the -- I mean, the REV '3434

1 spreadsheet is a spreadsheet that Audible Magic produced within
2 about 14 or 15,000 documents that it provided in response to a
3 very broad subpoena from Cox. And Cox took Audible Magic's
4 deposition -- I was attending that deposition. And at the
5 deposition Cox asked some general questions about Audible Magic
6 transaction logs which reflect MarkMonitor's use of Audible
7 Magic, but Cox did not show Audible Magic what Cox and
8 Dr. Feamster now claims is a log of these Audible Magic
9 transactions.

10 So, in effect, Cox in its summary judgment motion and
11 now Dr. Feamster here are relying on an in-authenticated
12 document that Cox really never asked the witness direct
13 questions about.

14 To the extent Cox did ask questions about transaction
15 logs generally, Audible Magic testified that it had to pull
16 transaction logs off of backup tapes, and that they were
17 incomplete, but that what it pulled off backup tapes covered
18 only the period of 2012 to 2014.

19 So in effect, what you have here is Dr. Feamster
20 using -- assuming it is what he believes it to be, being a
21 transaction log of MarkMonitor's usage of Audible Magic, his
22 use of it would be like saying, I am going to see how
23 productive or what work my employee did in the course of the
24 workday, which consisted of an eight-hour day from 9 to 5,
25 but I'm only going to look at the activity from 3 to 5 o'clock.

1 It's undisputed here that what occurred was that
2 MarkMonitor used Audible Magic for these audio identifications
3 over the course of years beginning as early as 2008 and
4 continuing through the end of the claim period in this case.

5 So if Dr. Feamster's goal, as he very clearly says in
6 his report and at deposition, and Cox has asserted again and
7 again in its pleadings, is to have him tell the jury that
8 75 percent or so of the works in suit were never matched to
9 Audible Magic's database, it's just flat out inaccurate. It's
10 Dr. Feamster, in effect, providing testimony that doesn't fit
11 the facts of the case. It's just patently unreliable.

12 It is not an issue of weight. This is exactly the
13 sort of thing that the Fourth Circuit cases say goes to, you
14 know, the expert's testimony needs to fit the facts of the
15 case. It's unequivocal that the logs go back to '08, but yet
16 his data set is only for that three-year period.

17 So our view is that both for reliability reasons and
18 just for reasons of confusion and prejudice, you know, that
19 that testimony has no place going before a jury.

20 I gave you a longer answer to what is that log, but I
21 think that covers it.

22 THE COURT: No, I was looking for that. All right,
23 go ahead then.

24 MR. ZEBRAK: Sure. So let me, let me take a step
25 back and explain who Dr. Feamster is and why we've brought this

1 Daubert motion.

2 As Your Honor has seen, we filed a number of these
3 motions. And as Your Honor will also have seen, we didn't move
4 to strike these experts entirely. We were very focused on just
5 those areas that we thought were not acceptable under the
6 Rules. And Dr. Feamster is perhaps the expert that pretty much
7 his entire testimony is problematic for the reasons I'm about
8 to cover.

9 Your Honor is well familiar with the law, so I'm not
10 going to cover the law on Daubert and confusion, I'll just jump
11 right into it. But Dr. Feamster in his report addressed four
12 separate categories, and I'm now in today's hearing going to
13 address a fifth one, which are undisclosed opinions he's
14 provided for the first time in opposition to our summary
15 judgment motion.

16 So that's what we have before us here today. And to
17 be clear, we're not bringing this simply because we disagree
18 with his conclusions. We disagree with his methodologies and
19 what we think is really just deceptive testimony that is not
20 going to assist the jury at all.

21 So Dr. Feamster has an extensive resumé, we're not
22 arguing that. But that doesn't give him license to confuse and
23 mislead a jury and proceed with a lack of intellectual rigor,
24 and that's exactly what we think he's done. And to the extent
25 he is testifying, he's testifying in ways that aren't tethered

1 to the evidence in this case. And that also has no place
2 before the jury.

3 So let me address each of the areas quickly, and I'm
4 happy to answer whatever questions Your Honor has. And if some
5 of this is redundant, just move me on, please.

6 So his first area is area one where Dr. Feamster
7 testifies that Mark -- he testifies about MarkMonitor's
8 downloads of these files. And he says, and I quote, "for
9 nearly all of the works at issue, MarkMonitor did not download
10 any portion of the work."

11 Now, Cox, in its briefs, accuses us of latching onto
12 just one small part of his report in this area. But this is
13 his executive summary. This is exactly what Cox wants to do
14 with Dr. Feamster, is confuse the jury about whether the works
15 in suit have been downloaded. It's not an issue in this case
16 about what happened on the downloads.

17 The testimony is unequivocal. MarkMonitor did an
18 initial download of these files, and then the files were run
19 through Audible Magic in order to understand what's in the
20 files. And thereafter, MarkMonitor relied on hash values,
21 which, until Cox and Dr. Feamster realized how many compelling
22 they were in proving the infringement, Dr. Feamster endorsed
23 the reliability of hash values to identify a file. And
24 thereby, once you already know what's in a file, when you see a
25 file with a matching hash, you know it has the same contents.

1 Dr. Feamster first ran back on that in opposition to
2 summary judgment, contradicting his earlier testimony. But in
3 this case, whatever testimony Dr. Feamster has on MarkMonitor
4 downloads, it's undisputed. There's no need for expert
5 testimony on that from him.

6 Cox, in its opposition, justifies his testimony by
7 arguing that somehow the MarkMonitor contract with the RIAA
8 called for a process more rigorous than the one that
9 MarkMonitor applied. There's no merit to that, Your Honor.

10 This is not something that Cox adduced in discovery
11 from MarkMonitor or the RIAA. Cox is confusing separate
12 systems and separate methodologies from the Copyright Alert
13 System.

14 And in any event, it doesn't show -- I mean, whatever
15 downloads MarkMonitor did or didn't do, it doesn't require Dr.
16 Feamster to confuse the jury about that. It's undisputed.

17 So let me move on to the second area, which we've
18 already largely covered, which is Dr. Feamster's testimony that
19 most of the tracks in the notices sent to Cox were not matched
20 by Audible Magic, and that fewer than 25 percent of the works
21 at issue were ever matched to the Audible Magic database.

22 Well, those statements, which are not qualified by,
23 well, just for the period of time I reviewed -- that's exactly
24 what Cox wants to mislead the jury about. Dr. Feamster's
25 testimony is not about just a limited period, it's about in

1 totality.

2 We see these, for the reasons I said, as just
3 baseless deceptive statements that, you know, are contrary to
4 the evidence.

5 So, you know, I think, you know, beyond that, there's
6 just no support for this testimony, and we could have a shorter
7 clearer trial without this confusion.

8 His third area is an area that the other side has
9 since withdrawn in light of our motions in limine. But I'd
10 like to spend just a brief minute on it, Your Honor, because I
11 think it's emblematic of the lack of rigor that, though he has
12 an extensive resume, Dr. Feamster brought to this case.

13 Dr. Feamster tried to contest the accuracy of Audible
14 Magic initially, even though it's the leading technology in the
15 industry, used by everyone, and courts have relied on it for a
16 decade plus. His analysis here was ginned up before the
17 litigation began. Dr. Feamster was paid to write an article --

18 THE COURT: Right, I recall the document.

19 MR. ZEBRAK: Yeah. And so, there's an undisclosed
20 article that he had no basis to question Audible Magic in that
21 article, let alone repeat it in his report here without even
22 disclosing the opinion. Now, now they've smartly withdrawn it,
23 as well as him making arguments about fair use and what
24 constitutes true infringement. But that -- it's reflective of
25 the approach he's taken to this analysis.

1 So the fourth of the five areas are what I refer to
2 as the pretextual reasons for Dr. Feamster saying
3 contemporaneous downloads are required at the time of each
4 notice, rather than one initially, and thereafter relying on
5 hash values.

6 None of his rationales, which I'll explain in a
7 moment, has a factual basis in this case. It's just irrelevant
8 academic theory. And the underlying presumption that
9 undergirds his testimony in this area conflicts with the law.
10 It doesn't matter whether these peers that we sent notices
11 about had 100 percent of the infringing file or somewhere
12 between 90 and 100 percent. It's an infringement.

13 Him implying that you must have full downloads or you
14 need to do a full download, otherwise you won't know if they
15 have the full file, it's just going to breed jury confusion and
16 it's irrelevant.

17 His justification for why -- his second justification
18 is that peers -- Your Honor is well familiar with this concept
19 of bitfield, which is how the whole BitTorrent system, in part,
20 is structured on. And it works, it's efficient, there's a
21 reason why BitTorrent is such a prolific tool for piracy. It
22 relies on peers indicating what they have that they're
23 distributing, and you can see the amounts that these folks have
24 on their systems.

25 Nowhere in his expert report did Dr. Feamster

1 criticize the accuracy or reliability of bitfield information.
2 Again, it was only in his deposition and then in their summary
3 judgment papers that he now brings up this theory that peers
4 sometimes lie about their bitfields.

5 Your Honor, there's no reason to think that happened
6 here. There's no reason to think that it happens at any sort
7 of a frequent basis. In fact, when pushed at deposition, and I
8 deposed Dr. Feamster, I wanted to know, how often does it
9 happen? What's your basis for raising this here? He
10 eventually said, well, to the extent it happens, maybe it
11 happens 1, 2 percent of the time. I'm paraphrasing.

12 So testimony like that, not based in the evidence, is
13 not appropriate.

14 And then the fifth and final issue that I'd like to
15 mention is that, again, not in his expert report, which cabins
16 the scope of his testimony, but in Cox's attempt to stave off
17 summary judgment, Dr. Feamster has done an about-face. Though
18 he understands, as he must, that hash values are reliable and
19 the world uses them for file identification, he now brings up
20 various issues that he wants the Court to see as somehow
21 casting doubt on our motion for summary judgment. Again, it's
22 improper testimony. It shouldn't be there.

23 But to address it very quickly, number one, he talks
24 about a concept called a "hash collision," which involves
25 essentially independent creation of two files with different

1 content that have the same hashes. Again, it's deception. It
2 happens when you look at the numbers and the frequency. It's
3 something like less than a trillion of a -- I can't even say
4 it, lacking a capacity for some of this math, which I know
5 lawyers are famous for.

6 And the second piece of this is on summary judgment
7 there was another undisclosed issue on hash values, but I
8 don't, unless the Court wants to, need to extrapolate on that.

9 And I think that's an overview. Any questions you'd
10 like me to answer?

11 THE COURT: I don't have any right now -- well, so in
12 the Rightscorp -- in the BMG case, there was an issue as to
13 whether Rightscorp had reduced the hash values it was looking
14 at down to 10 percent versus the 100 percent, and it turned out
15 that none of that was occurring during the infringed -- alleged
16 infringing period.

17 Is that an issue in this case or not?

18 MR. ZEBRAK: It is not an issue in this case, but I'd
19 like to give you one caveat to that, and it's a teeny, teeny
20 caveat. So in this case MarkMonitor, underlying each of these
21 notices, recorded what are called "evidence packages," and
22 those packages record the amount of the bitfield.

23 So for all these notices, we, and Cox, and everyone's
24 respective efforts -- experts can see the amount in the
25 bitfield. And I think there was a day or two, for testing or

1 some other reasons, where a small number of notices, I think
2 it -- it's in, I think, the parties' respective papers, I think
3 it was something like maybe 143 out of the 264,000 notices. It
4 was -- again, I may be wrong on the numbers, but there's no
5 issue about a change in bitfield level.

6 The RIAA had a very -- through MarkMonitor, a very
7 conservative approach to notices here. They wanted the peer to
8 have at least 90 percent of the file, and it's seen throughout,
9 and that's what the documents show.

10 THE COURT: All right. Thank you.

11 MR. ZEBRAK: Thank you.

12 THE COURT: All right. Mr. Buchanan.

13 MR. BUCHANAN: Yes, Your Honor.

14 So with regard to the first point made by counsel for
15 the plaintiffs about the MarkMonitor downloads and whether
16 Mr. Feamster testified that there were no downloads. If you
17 consider the first and second points Mr. Zebrak discussed, it
18 indicates that, in fact, Mr. Feamster did recognize that there
19 was downloading by MarkMonitor as part of the verification
20 stage of their investigation process.

21 So the first thing that MarkMonitor did was download
22 from the Internet music, musical compositions, sound recordings
23 from an Excel spreadsheet or a list that had been provided by
24 the plaintiffs, and then they would attempt to match that to
25 the Audible Magic database. Audible Magic had apparently

1 provided MarkMonitor with software that allowed them to create
2 a fingerprint. They would match the fingerprint to the
3 fingerprint that already existed in the Audible Magic database
4 that had come from the plaintiffs at sometime before then.

5 So when Dr. Feamster testifies about the Audible
6 Magic spreadsheet, REV '0344, within that is an analysis of the
7 downloaded files, allegedly downloaded files of MarkMonitor,
8 being compared against the Audible Magic database. So he's
9 acknowledging, by his testimony and his report, that that
10 happened.

11 So just to be -- make it simple, what he's not going
12 to testify, nor is anyone else going to testify in this case on
13 behalf of the defendants, that there wasn't downloading by
14 MarkMonitor of files supposedly to be the files that are the
15 works in suit.

16 Now, with regard to -- with regard to the dispute
17 over whether there needed to be downloading versus just a match
18 by way of a hash through some metadata, Dr. Feamster will
19 testify two points there. One goes to your last question or
20 your question to the plaintiffs' counsel, which was about the
21 90 to 100 percent downloading.

22 So here we do not have any downloading by MarkMonitor
23 at the detection phase. That's where they got the hash and
24 then they went out and tried to match it to a file on a
25 computer, say a Cox subscriber, and they would try to match it

1 with the metadata. And they'd use the hash to do that.

2 And their view is that if you have a hash for a file,
3 that that is irrefutable proof that the two match. They're
4 unique, they're a fingerprint.

5 So two points on that. And that goes to your 90 to
6 100 percent. They didn't download anything at that phase. So
7 this is important on the issue of direct infringement, because,
8 as you pointed out in the BMG case, just making the file
9 available does not constitute infringement. You have to have a
10 downloading.

11 And the Court went on to say that because Rightscorp
12 downloaded the file, that was evidence that there was
13 distribution or dissemination of that file. Here, we have no
14 such evidence.

15 THE COURT: Well, we've got sampling, right? There's
16 sampling that occurred during MarkMonitor's identification
17 process of the hash marks versus the music? Is that -- am I
18 right about that?

19 MR. BUCHANAN: No. So there was no sampling that I'm
20 aware of. What we have is the downloading of the files at one
21 phase and matching it to the database remotely of Audible Magic
22 by way of the two fingerprints.

23 THE COURT: Right. Correct.

24 MR. BUCHANAN: And then simultaneously, they proceed
25 and take the hash value and can search, say, for -- look for a

1 Cox subscriber or any subscriber out there on one of the
2 so-called pirate networks, BitTorrent, eDonkey, Gnutella, and
3 Ares, and they search and they say, okay, here, that hash
4 matches.

5 So the reference to the MarkMonitor contract that
6 they say is irrelevant, the relevance of that is that
7 MarkMonitor suggests that we download just like Rightscorp,
8 because that way you know the full content of the file, you
9 know for sure, it's not just metadata.

10 So if you're creating 174,000 evidence packages for
11 purposes of copyright enforcement and litigation, you want to
12 have the full download. So there's two points. Dr. Feamster
13 will say, in his expert opinion, you needed to have the content
14 downloaded so you could match, because it could be situations
15 where what purports to be in this file by way of the hash is
16 not actually that content.

17 And that's a dispute between two experts. It's not
18 deception. It's not untethered to the facts, misleading, as
19 Mr. Zebrak says. It's his expert opinion.

20 And clearly whether they downloaded the music or the
21 musical composition, the file, their sound recording that's on
22 this file during the detection phase, is very relevant to the
23 issue of whether there is contributory or vicarious liability
24 in terms of whether there was disseminate -- contributory
25 liability because whether there was dissemination or

1 distribution of that file.

2 As the Court pointed out, BMG making it available,
3 letting it sit there on the file, is not enough. And there's
4 no evidence in this case not only that it was disseminated, but
5 any downloading.

6 And in that case, again, the Court pointed out that
7 there was circumstantial evidence of dissemination and
8 distribution of the files in the BMG case because Rightscorp
9 itself did it.

10 So that is important evidence for us, and we should
11 be able to put that forward. They can attack him all they
12 want, but his credibility and whether he's misleading, that
13 goes to weight. The issue is, those are real issues and he is
14 an expert in that field and should be able to testify about
15 that.

16 Now, in terms of the Audible Magic spreadsheet, so
17 it's -- it is true that that particular spreadsheet, REV '344,
18 was never shown, handed to Vance Ikezoye, the CEO of Audible
19 Magic. However, that individual testified at length that we
20 produce transaction logs, which have basically 17 columns of
21 information, including match offset, verification ID number,
22 the artist, the track, the album, when it was -- when it was
23 matched, the match offset, which is the point when they were
24 comparing them, and, you know, all this data, and he testified
25 about that, what was in there.

1 And he said, when MarkMonitor or another vendor
2 remotely accesses our database, it creates -- there's a query
3 that comes in and there's information that's matched up, like
4 Shazam, you match the two files, you go for 30 seconds, and
5 then if it's a match, Audible Magic has a record as does
6 MarkMonitor. So the two should have a database that matches.

7 So what we have is an Audible Magic spreadsheet,
8 which was created at the time and simultaneous with the queries
9 for MarkMonitor. So that's what we have, that's what they
10 produced. They don't want it in evidence because it only shows
11 that there was matches for 25 percent of the works in suit.
12 And they say it lacks credibility because that 25 percent only
13 goes to a certain portion of attempted queries or matches that
14 took place during the period 2012 to 2014.

15 That's not quite correct. 25 percent of the
16 100 percent of the works in suit were queried before the period
17 in question. 75 percent, according to the testimony, were
18 queried at the -- within the time period and, therefore, on
19 that spreadsheet.

20 So what we have is of the 75 percent of the works in
21 suit, according to Audible Magic database and their
22 spreadsheet, which is only spreadsheet that was created and
23 retained as of the time that the queries were made, shows that
24 the matches were limited to 25 percent of the works in suit.

25 So where does this other spreadsheet come from? So

1 we have MarkMonitor, which refused to produce anything in
2 response to a subpoena, even though they were totally
3 controlled by the plaintiffs and had a contract with the
4 plaintiffs that required them to produce documents, to keep
5 records, to come to court and testify, they refused to produce
6 anything. We spent a fortune getting the documents from them,
7 the data that -- the spreadsheet and other information that we
8 requested.

9 So one of the things that MarkMonitor produced was a
10 spreadsheet called the '236 spreadsheet, which basically is the
11 same as the Audible Magic spreadsheet, except it was created in
12 2018 and it relies on data that existed after 2015. And as the
13 witnesses have said, you cannot tell when those queries were
14 made.

15 So then we have a '431 spreadsheet which was produced
16 by the plaintiffs and counsel, which they took the '236
17 spreadsheet and they removed certain data on that spreadsheet
18 that indicated there weren't matches. There was for about
19 9 percent of the files for which there was data.

20 So on the '236 spreadsheet there is various columns
21 that are not on the '431 spreadsheet. What those columns show
22 is things such as the duration of the song, the match offset,
23 when it took place, and the duration of the known and unknown
24 files, and also the match percentage. And the match percentage
25 is a column that was created by MarkMonitor to compare the

1 length of the two songs and the amount of the actual match.

2 And so, if you look at these columns -- and I can
3 hand the Court an example which was created by the plaintiffs
4 at the last hearing, if you want to look at them. You can see
5 in yellow -- they already have them -- those are the columns on
6 the '236 spreadsheet which are not -- not on the '431
7 spreadsheet. And you can see there is 0s and -1s when it
8 says -- in the column regarding the match.

9 So what we -- what they are submitting is that
10 spreadsheet should not be admitted in evidence, the Audible
11 Magic spreadsheet should not be admitted into evidence, but the
12 '431 spreadsheet, which takes those four columns out, which
13 they did that during discovery in 2018, 2019, that should come
14 in.

15 So what we're saying is, if the spreadsheets have to
16 come in, put them all in and we can have testimony about them.
17 But the Audible Magic spreadsheet is the only spreadsheet that
18 is based on data created at the time in question and which
19 reflects queries and responses simultaneously made as they came
20 in.

21 So the issue that somehow it is not authentic,
22 Vance Ikezoye, the CEO of Audible Magic, testified at length
23 about transaction logs. He goes, we produced to you a
24 transaction log that has this information.

25 MarkMonitor testified that, yes, Audible Magic had

1 their own data, we had ours, and we have our own spreadsheets
2 that have this information. Audible Magic produced all the
3 data that we have. We retained some of it at different points
4 in time, but this is what we have today. And it says, of 2015,
5 we created it in 2018.

6 So if you compare these spreadsheets, you'll see that
7 they are very similar. But all the data in the '236 and '431
8 spreadsheets, except for maybe the column, the so-called yes
9 column that was created by MarkMonitor, the verification ID
10 column which says "Real" on it, that was created by MarkMonitor
11 to indicate there was a match. Basically all the other
12 information is the same.

13 And even during the deposition of the plaintiffs'
14 expert, Barbara Frederiksen-Cross, she compared all these
15 spreadsheets repeatedly. She criticized Dr. Feamster, but she
16 said, he relies on the Audible Magic spreadsheet, the
17 transaction logs. He should rely on this one.

18 And we say, why? Why should he rely on that one?

19 It's a dispute, it's a legitimate factual dispute,
20 and it should go to the jury.

21 In addition, there was no affidavit or declaration in
22 this case by Mr. Ikezoye or anyone else from Audible Magic to
23 suggest that that spreadsheet is not what it purports to be.

24 Even during the deposition of Barbara
25 Frederiksen-Cross, the plaintiffs' expert, there was some point

1 where there was some confusion over which spreadsheet was being
2 referenced, the '431 or the REV '344. And Mr. Gould spoke up
3 and said, let's make sure we're talking about the Audible Magic
4 transaction logs and not the '431.

5 I mean, he acknowledges right in the deposition that
6 this REV '34 is the transaction logs from Audible Magic created
7 in time. I can show you the deposition, the quote, it's all
8 there.

9 So I don't know if the Court has any questions --

10 THE COURT: No, that's all. Go ahead.

11 MR. BUCHANAN: Thank you, Your Honor.

12 THE COURT: All right. Mr. Zebrak.

13 MR. ZEBRAK: Your Honor, very briefly, and, quite
14 frankly, it's difficult to even to know where to begin. There
15 is just a tremendous amount of vague statements and inaccuracy
16 in that.

17 THE COURT: Well, begin by -- I mean, Mr. Buchanan's
18 point is they received this information from MarkMonitor. They
19 looked through a lot of exhibits. They culled out '344. They
20 were interested in it. They studied it. They found that based
21 on that document, that there was far less confirmation of
22 matches.

23 And that they then looked at the '236 and the '431
24 spreadsheets that were produced, and that they should be
25 allowed to rely on all of them. They were all produced by

1 MarkMonitor, and they find the REV '344 to be interesting.

2 MR. ZEBRAK: Yeah. Well --

3 THE COURT: So where -- that's the bottom line, is
4 that there is no -- well, I haven't seen the motions in limine.

5 MR. ZEBRAK: Sure.

6 THE COURT: I don't know whether there, you know, is
7 authentication issues. There is -- whether there were
8 different uses involved in one spreadsheet versus another
9 spreadsheet. It appears that the REV '344 was
10 contemporaneously generated. And I don't know the background
11 of that.

12 So go ahead.

13 MR. ZEBRAK: Yeah. Sure. So, first of all, there
14 are declarations submitted in this record, both on summary
15 judgment and I believe for the motion in limine, that will make
16 this incredibly clear for Your Honor. This is an example of
17 the kind of confusion that Cox hopes to bring about at trial
18 where they want to present dizzying arguments about data from
19 different spreadsheets. And, quite frankly, none of it has an
20 evidentiary foundation. And it -- let me break it down one by
21 one though, Your Honor.

22 The Audible Magic spreadsheet, that is REV '3434,
23 that is a spreadsheet that Audible Magic produced in discovery
24 that contains -- if it actually is what Cox and Dr. Feamster
25 say it is -- and I say it that way because it's their

1 obligation to lay a foundation for it. It's never
2 authenticated. So it is a leap on their part that they have
3 identified the right document. So that's the spreadsheet upon
4 which he uses to opine that less than 25 percent of the works
5 were matched to Audible Magic. Okay. So unauthenticated, no
6 foundation.

7 That spreadsheet, assuming that it is what they say
8 it is, covers just the years 2012 to 2014. Whereas the initial
9 lookups go all the way back to 2008.

10 Now, I'm not sure where Mr. Buchanan came up with
11 this figure that 75 percent of the works in suit indicate that
12 they were only matched in the -- in those three years. I don't
13 believe that to be accurate.

14 There is unequivocal testimony from MarkMonitor about
15 its process. And the '431 spreadsheet, which has been produced
16 by plaintiffs, it's MarkMonitor data they gave to plaintiffs.
17 And MarkMonitor then produced its own spreadsheet called the
18 '236 spreadsheet. But all of this has been authenticated by
19 MarkMonitor in declarations and in deposition testimony.

20 The MarkMonitor '431 spreadsheet, their process is
21 unequivocal. MarkMonitor isn't making up what these files are.
22 There is no basis to presume that. It's a preposterous
23 assertion.

24 MarkMonitor's process was, the first time it saw a
25 file that it suspected to be infringing, it downloaded it, and

1 it ran it through Audible Magic. And Audible Magic provided
2 data indicating what the file contained. And that data
3 MarkMonitor stored in its database and produced it in discovery
4 here.

5 So Mr. Buchanan and Cox have no basis to say that
6 there is a lack of contemporaneous data about what these files
7 contain. And, quite frankly, the whole contemporaneous issue
8 is a red herring because it doesn't matter whether I look at a
9 file with a unique hash in 2012 or 2014, it should have the
10 same contents. Dr. Feamster testified about it until he didn't
11 testify about it because it was inconvenient to Cox.

12 So, you know, Your Honor, there is a constant
13 narrative going that MarkMonitor refused to cooperate in
14 production, in discovery, and there is some insinuation that,
15 quite frankly, we take offense to, that plaintiffs had
16 something to do with that. It's not accurate. And the record
17 of how Cox approached discovery from MarkMonitor speaks for
18 itself, and it has been criticized in that.

19 MarkMonitor had some issues about protecting source
20 code, and those were dealt with --

21 THE COURT: I don't need to hear that.

22 MR. ZEBRAK: Yeah. Okay. Well, then to keep moving
23 on, Your Honor.

24 THE COURT: The downloads.

25 MR. ZEBRAK. Yeah. So the downloads -- look, it's

1 undisputed. You've heard from both Mr. Buchanan and myself
2 today that the files were downloaded the first time that we ran
3 across them. And then, thereafter, it was hash values we
4 relied on. To the extent -- you don't need testimony from
5 Dr. Feamster confusing people about that. That's in the
6 record. If they want to cross-examine plaintiffs --
7 MarkMonitor about that, they can.

8 But, you know, they accuse -- I mean, one of the
9 other issues here, Your Honor, is that Mr. Buchanan is telling
10 you what Dr. Feamster ought to be able to testify to. Notably,
11 he's not testifying -- well, Mr. Buchanan is not referring to
12 what Dr. Feamster said in his report. And that cabins his
13 testimony here.

14 The very first bullet point in his summary is that
15 nearly all the works in suit were not downloaded. That is
16 exactly what they want to do with this deceptive testimony.
17 Rightscorp relied on hash values as well when it sent its
18 notices. And our view, just to come back to the initial
19 analogy I had, if you're trying to measure what an employee did
20 in the course of the day, you don't just look at the last two
21 years and say, it all goes to weight, because it needs to fit
22 the facts of this case. This doesn't. It's confusing, and it
23 is unreliable under the Fourth Circuit case law.

24 Thank you.

25 THE COURT: Thank you. All right.

1 Let's move on to Tregillis.

2 MR. ZEBRAK: Thank you, Your Honor.

3 So Christian Tregillis is one of five experts that
4 Cox puts forward in this case. The portion of his testimony
5 that is the subject of our Daubert motion is the portion that
6 concerns his purported attempt to do an actual damages
7 analysis. The other part of his testimony concerns a similar
8 analysis to what plaintiffs' expert, Dr. McCabe, did in
9 verifying that the works in suit are supported by the
10 infringement data. The two experts are largely in agreement on
11 that. It's this actual damages analysis where really the
12 Fourth Circuit case of Tyger, T-y-g-e-r, and Dash that we talk
13 about, we think, quite frankly, render this aspect of Dr. --
14 excuse me -- of Mr. Tregillis' testimony a non-starter.

15 You know, Mr. Tregillis, just to sort of set the
16 table, what he did was he did a lost licensing analysis where
17 he attempted to measure what Cox would have paid to plaintiffs
18 to -- you know, for what plaintiffs would have charged for this
19 activity.

20 THE COURT: I know. He just used a dollar a piece
21 and counted one --

22 MR. ZEBRAK: Yeah. Right, right.

23 THE COURT: -- and equated it to YouTube and didn't
24 look at peer-to-peer information. So I understand the basic
25 premise.

1 MR. ZEBRAK: Yes, Your Honor.

2 THE COURT: And so, go ahead.

3 MR. ZEBRAK: Yeah. Well, so the Tyger and Dash cases
4 require an expert who is going to do an actual damages analysis
5 to justify the benchmark they use for the comparable royalty
6 rate.

7 Mr. Tregillis made no effort to do that. His
8 testimony that we lay out in his expert -- in our Daubert
9 motion -- you know, we provide the details. He made no
10 analysis for that. He can't justify the benchmark. And, in
11 fact, it's not -- it's clearly an inapplicable benchmark.

12 You know, the premise for a benchmark is it needs to
13 reflect the underlying economic realities of the situation.
14 His benchmark reflects what a user who goes to iTunes downloads
15 for their own personal use. That's priced for that. It's not
16 priced to allow the user to have it in their share folder on
17 peer-to-peer, which is the economic reality of this situation.

18 And so, you know, Cox attacks us in our motion to say
19 our whole premise in attacking his benchmark is based on the
20 faulty proposition that he did something he didn't do. Either
21 way, what he did is improper. He either did a lost licensing
22 analysis that is not based on the underlying economic realities
23 because he only considered the cost of download, not the rights
24 that plaintiffs would have to transfer to authorize
25 distribution. Right.

1 So he either did that without looking at the
2 realities. Or, had he done it, he didn't ascribe any value to
3 it. And, of course, there is value to it.

4 And so, it's just a palpably inappropriate benchmark.
5 He indicated --

6 THE COURT: Well, so he says -- I misspoke. I meant
7 iTunes. He says, there is no evidence of how many uses were
8 made once the download -- or once the song got to the customer,
9 and that's peer-to-peer, but I don't know whether it was
10 shared, whether it wasn't shared, there is no data on that,
11 it's impossible to estimate that and, therefore, I'm not going
12 to consider it because it's Sony's burden to prove damages.

13 MR. ZEBRAK: Sure.

14 THE COURT: So I'm going to fall back on iTunes. So
15 what's your response to that?

16 MR. ZEBRAK: Sure. So there's several things in
17 response to that, Your Honor. First of all, in a case where we
18 elect statutory damages, we have absolutely no burden to prove
19 actual damages. Statutory damages, as Your Honor is aware, was
20 created precisely for situations like this where actual damages
21 evidence is hard to obtain, among other reasons.

22 So -- and that's exactly what Cox wants to do. They
23 want to flip this around and have Mr. Tregillis say, this is
24 the sum total of the actual damages, and I didn't calculate any
25 distributions because there is no proof of distributions.

1 But, Your Honor, a couple things there. Number one,
2 the inability to quantify something doesn't mean that there is
3 an absence of that activity. Obviously, among the hundreds of
4 thousands of notices, which represent just a small snapshot of
5 the infringing activity by Cox users, obviously there were
6 distributions. You know, we can disagree about the scope, but
7 it -- you know, the argument -- I mean, clearly there were
8 distributions.

9 And, you know, Dr. -- excuse me. Mr. Tregillis
10 indicated that there are things that he could have done to
11 attempt to go -- at least come up with an estimate for those
12 distributions.

13 Now, that plaintiffs didn't do it because plaintiffs
14 chose not to build their case by proving actual damages, is not
15 a justification for him to use an improper comparable benchmark
16 because it's not comparable. You know, he said -- I asked
17 him -- and again, this is in our motion. I said, what would
18 you do if you were trying to measure distributions? Well, what
19 should the plaintiffs have done? Because he faulted us for not
20 obtaining that evidence.

21 He said, well, I'd talk with the labels. I'd look to
22 see if estimates can be made from the technology.

23 The point here is, Your Honor, is that he has the
24 obligation to justify the comparable he chose. He made no
25 effort to ascribe any value for distributions. That's the

1 reality of the situation, is that -- and, obviously, there are
2 many, there are many distributions, but the mere fact that the
3 right we transferred, according to him that he is pricing, our
4 actual damage here, that right was conveyed. Someone had it
5 there. Whether there were a million unauthorized distributions
6 or a thousand or a trillion, the point is that right was
7 transferred. When you grant a license, you know, you look at
8 the realities of the rights that are granted, and he is only
9 looking at the right granted for the Cox user to download. But
10 they took the right to distribute. And that can't be debated,
11 that they took the right to distribute.

12 And so, under the Tyger case, you know, fundamentally
13 it's the wrong, unjustified benchmark. And it's his burden to
14 show and Cox's burden to show that they had the right one. And
15 it was either Tyger or Dash said, when your analysis is solely
16 based on an incomparable benchmark, which clearly this is, that
17 renders it unreliable, and we could stop there.

18 But it goes a lot further, Your Honor, because just
19 as in Tyger where they were trying to come up with a
20 quantification of cost overruns, here Mr. Tregillis
21 acknowledges the data doesn't exist. He doesn't dispute that
22 there are distributions, because it would be absurd to do so.
23 He says, I can't quantify them because, he agreed, there aren't
24 logs kept of that activity.

25 So what does he do? Instead, he proceeds with an

1 analysis saying, the plaintiffs' actual damages are the
2 following because Cox wants this deceptively low number based
3 on a sliver of the activity with a professional testifying
4 expert who is going to talk about what the evidence of the case
5 is or isn't and use a palpably improper benchmark on this.

6 And, you know, so for those reasons, the damages
7 portion are out. And just so we don't lose track of it, I'm
8 happy to speak now or at the end, but he does two other things
9 in his expert report ranging from testifying to the law and
10 making arguments about what the jury should award on statutory
11 damages, to talking about the efficacy and effectiveness and
12 how Cox's anti-piracy procedures worked well work where he did
13 no analysis for that. He is not qualified to do that. It's
14 part of the narrative from Cox's experts of telling the jury
15 what to think.

16 Thank you.

17 THE COURT: All right. Thank you.

18 MR. BUCHANAN: Thank you, Your Honor.

19 I think, once again, we have a straw man argument
20 that the plaintiffs have put forward to try to preclude
21 Dr. Tregillis. They keep using the term "lost license
22 analysis." That's not a term that Dr. Tregillis used in his
23 expert report. It's not what he did. He merely took evidence
24 provided by the plaintiffs regarding the legal download of a
25 file, you know. And he used their numbers that they produced

1 in the form of a proffer, both as to musical compositions and
2 to sound recordings, like 10 cents and 90 cents when you
3 average it out.

4 They don't dispute any of that. They don't dispute
5 that that evidence was provided by them through a proffer. And
6 they don't dispute any of his mathematical calculations where
7 he comes up with \$675,000 in actual damages.

8 THE COURT: Well, they talk about his not identifying
9 actual infringements, just notice data in the data that he
10 used, right? So they took issue with that.

11 MR. BUCHANAN: So that's what Dr. Sullivan did in
12 BMG.

13 THE COURT: Yeah.

14 MR. BUCHANAN: He basically said, I have notices, I
15 will give them on a conservative basis, and this is what
16 Dr. Tregillis did, I will, you know, basically treat every
17 notice as an infringement. If it's an album, I'll give them
18 credit for every song in the album. If there's ten songs on
19 the album, every one of those will constitute infringement.

20 He didn't try to dedupe any of the notices because,
21 obviously, notices relate to the same song. Maybe on Tuesday,
22 Wednesday, and Thursday Billy left on his file Born Run, and it
23 got hit every time by MarkMonitor and they fired out a notice.
24 He didn't dedupe those. He counted them all.

25 Unlike Dr. Sullivan, he didn't take out streaming

1 downloads. He counted those.

2 So he attributed all possible, you know, royalties as
3 they use to the notices, which are the -- really the evidence
4 that they have of downloading because that's what they're
5 saying. They're saying there's 57,000 Cox subscribers, 54,000
6 residential subscribers, 3,000 business subscribers that
7 received one notice after receiving two other notices, either
8 from them or someone else. That's their theory of damages in
9 the period January 2012 to November of 2013.

10 So we're basically saying, we take all that time
11 period, we take every notice you sent to us about every work in
12 suit. We won't dedupe anything and we'll count that. And
13 we'll use the information you to gave us in which you utilized
14 to determine the value of each song for purposes of just a
15 single legal download.

16 And they've answered their own question. They say,
17 well, he doesn't consider the value of a royalty. Well, he
18 admits, you know, that is not something you can determine.
19 That's something you argue to the jury.

20 They don't do that. And they say, we don't have to
21 do it. They don't do it because they can't do it. That
22 doesn't -- that means he can't do it.

23 But -- so they say, we go to statutory damages, we
24 don't need to do actual damages. So the law is absolutely
25 clear that in a case like this where someone elects statutory

1 damages, that the defendants can use actual damages to counter
2 that, to show what in fact their real losses were.

3 And so, he doesn't dispute that his analysis does not
4 count every single download, whether some Cox subscriber
5 downloaded Born to Run, and somebody from Comcast, you know,
6 using their system, or Time Warner, or Verizon came along and
7 also downloaded it, which would go to an infringement by those
8 networks and their subscribers. So that's a different analysis
9 altogether that he doesn't get into.

10 But it was allowed in BMG. This is a more
11 conservative analysis. And we think we have an absolute right
12 to put on an alternate damages model related to actual damages.
13 This was allowed in that case. The identical motion was filed
14 in that case, making the identical argument, and the Court
15 ruled in favor of Cox in that case.

16 Thank you, Your Honor.

17 THE COURT: How about the fact that he's -- whether
18 he's qualified to talk about statutory damages. And, of
19 course, I'm sure you're not going to argue -- and I think you
20 had referenced the fact that he's not going to be citing law to
21 the jury.

22 MR. BUCHANAN: That was just like a reference. He
23 cites the Copyright Act and some case law and he says, you
24 know, I understand based on this from counsel that, you know,
25 statutory damages are allowed and you can do this. He's not

1 going to testify about any of that. And the Court wouldn't let
2 him do that. We wouldn't try to do that.

3 This bit about the efficacy of the system. He's
4 basically saying that because based on Dr. Weber's analysis and
5 some of his, that based on an analysis of the notices that came
6 in from the plaintiffs during the period in question, 2012 to
7 2013 -- I'm sorry, 2013 to 2014, that based on their notices
8 alone, after the first notice, 50 percent of the people who
9 received one notice didn't get a second one.

10 THE COURT: How is that relevant?

11 MR. BUCHANAN: So that -- you mean in terms of this
12 argument?

13 THE COURT: You know, even the broader argument with
14 Weber and --

15 MR. BUCHANAN: Well --

16 THE COURT: How is their reconstruction of what Cox
17 did and whether it was reasonable or not relevant here?

18 MR. BUCHANAN: So in this particular case?

19 THE COURT: Yes.

20 MR. BUCHANAN: I think -- here's why it's relevant.
21 Because their argument is that the Cox system was not
22 reasonable, basically, it wasn't efficient. Essentially, we
23 didn't do anything to stop infringement.

24 So there's two ways you can stop infringement. There
25 is sending them the notice, forwarding the notice that comes in

1 from the plaintiffs, which we did. Attaching an e-mail which
2 says, if you continue to do this, you could be terminated.
3 Having a contract which says, this is unlawful, and following
4 up on it when we did.

5 We had no caps in this case in terms of, you know,
6 not forwarding the notices. The cap was 600. They never came
7 close to that except for six times over the two-year period.
8 There's no issue with the caps with regard to the -- a notice
9 per day because that only happened on a handful of times.

10 So what this run-off shows is that notices of
11 infringement that people were receiving was working, it was
12 getting people to stop.

13 So when you get to six notices, you've got 85 percent
14 of the people that never got another notice.

15 THE COURT: Yeah, but where does that fit into your
16 defense? Is it -- does it go to willfulness? Does it go -- I
17 allowed in, in the BMG case, Cadenhead to talk about that
18 96 percent and the --

19 MR. BUCHANAN: Right.

20 THE COURT: But that was all factual information that
21 Cox had at the time it was using this system. And what
22 relevance is it of some expert to get up and say, this is
23 perfectly reasonable to me, I've run the data now in hindsight,
24 and I think that what Cox did was perfectly reasonable?

25 MR. BUCHANAN: Because the plaintiffs are arguing

1 that we really did nothing. Okay? We had a 13-strike policy.
2 So their whole case goes on termination. Okay? But it's
3 unclear when, under the law, or this case, when we should have
4 terminated.

5 So in their complaint, in paragraph 10 they say, for
6 the period in question, we are seeking damages for the notices
7 that we sent to those Cox subscribers that had received three
8 notices from us or some other person.

9 So what we're saying is, well, if that's the
10 analysis, these people by three, most everyone had stopped.
11 They didn't get another notice.

12 So again, in every case you have a liability at a
13 point in time and you have damages that feed off that point in
14 time. So what is the point in time in which liability
15 attaches? Not direct infringement, but contributory or
16 vicarious. And in their case, it's termination.

17 So if we're going to show 57,000 people that are
18 going to say after one notice, and this gets to Lehr, all
19 57,000 people should have been terminated, 3,000 businesses,
20 hospitals, universities, dorms, apartment complexes, one
21 notice, shut the whole city down.

22 So what we're showing is that, look, we had a system
23 in place. And we have a right to argue to the jury that the
24 system was set up. That termination wasn't the beginning and
25 end-all. There's no law that says we have to have termination

1 at some point. And they're saying we should have terminated at
2 one, three or five. How can that go to the jury?

3 The notices in question, first of all, were going to
4 a Cox e-mail address, which I would say nobody ever looks at
5 that. And we have data from our own subscribers who wrote back
6 saying, what is this about? Often it's a neighbor. It's the
7 kids doing it. You shut them down?

8 And so, it goes to, did we materially contribute?
9 Did we enhance the ability for people to infringe? And if --
10 our system is two parts. We send them notices with the e-mail.
11 And then, of course, there's the suspension, and the Court is
12 aware of that, and the termination.

13 And they'll get up and say, well, you only terminated
14 13 people over this period of time. Well, by time we got to
15 ten, there was -- 98 percent had stopped.

16 So that's where the whole CAS thing comes in where
17 they negotiated with the other ISPs. There they gave one
18 notice a week and they didn't require them to suspend anyone
19 because all the deposition testimony evidence there shows that
20 they, you know, the copyright center, the RIAA, the ISPs,
21 content owners, had got together, studied it and found what
22 works is to educate them, send the MAT, alert them, refer them
23 to Websites, to information, and they will stop.

24 So that is how they approached it. They called it an
25 educational program, which is not relevant here. Well, that's

1 what ours was. We're doing the same thing. We're -- we've got
2 references in the notices and e-mails to literature.

3 So I think it -- if that weren't to be admitted, they
4 would just say that no one was ever terminated and everybody
5 continued to infringe. So in other words, you have 57,000
6 people, the jury would have no idea what happened. What
7 happened with the notices? Did they work?

8 THE COURT: Well, okay. Thank you.

9 MR. ZEBRAK: Very briefly, Your Honor.

10 THE COURT: Yes, sir.

11 MR. ZEBRAK: So Cox's opposition just now went pretty
12 far afield and --

13 THE COURT: Well, I asked the question, so --

14 MR. ZEBRAK: Well, no, I understand. But literally
15 it touches upon a number of other motions in limine, and what
16 I'd like to do is --

17 THE COURT: You don't have to respond to that at all
18 if you don't want to.

19 MR. ZEBRAK: No. Well --

20 THE COURT: It was a question I wanted to --

21 MR. ZEBRAK: Sure. What I'd like to do, Your
22 Honor --

23 THE COURT: Because it is -- you know, you mentioned
24 it with Feamster --

25 MR. ZEBRAK: Sure.

1 THE COURT: -- and that he wanted to talk about the
2 damages --

3 MR. ZEBRAK: Sure.

4 THE COURT: -- and whether the number of
5 infringements went down after notices. So go ahead.

6 MR. ZEBRAK: So -- yeah, so with respect to Mr.
7 Tregillis' Daubert motion that we have before us, I'd like to
8 address that and just briefly respond to a couple of other
9 points.

10 So, look, at its core what Mr. Tregillis has done is
11 purport to come up with an actual damages analysis that looks
12 at the cost of buying one newspaper from a newspaper bin,
13 rather than the cost of a bin that has an unlimited number of
14 newspapers for whoever wants them.

15 Now, he's saying, that's okay, because there's no
16 proof that someone took more than one, even though I
17 acknowledge -- well, actually what he says is -- he doesn't
18 dispute that people took more. He says, no one can quantify
19 how much more was taken.

20 So I understand you conveyed the right for an
21 unlimited number of newspapers. But I'm just -- since we only
22 have evidence of the one that was taken, I'll calculate that.

23 There's no value to that. It's confusing to a jury.
24 It flouts the Fourth Circuit cases which stand for the
25 proposition that when you're using a comparable royalty rate,

1 whether you denominate it as a loss licensing analysis or
2 something else, that's a distinction without a difference, Your
3 Honor.

4 The point is, when you come up with a royalty rate as
5 a comparable, the expert is obligated to come up with one and
6 justify it. He made no effort to do it here. In our papers we
7 use the example of the street light effect, which we thought
8 was illustrative of this. He took this information, he said,
9 because it was the only thing available.

10 Now, as a sign for what we think shows you sort of
11 the wafer thin substance of Cox's arguments here, you know,
12 they make arguments about some back-and-forth at a deposition
13 to make some estoppel point. Or we produced a royalty rate
14 because they were pressing for it in discovery, and we gave the
15 rate trying to avoid some other more voluminous discovery,
16 which we ended up having to provide after we were ordered to do
17 so. And then they made no use of it.

18 Because, quite frankly, our historic revenue from
19 these activities doesn't show the actual damages. And so, this
20 actual damages analysis is a house of cards. We think it falls
21 apart for those reasons.

22 In the BMG case -- we're different lawyers, arguing a
23 different case. And in this instance, we've attacked his
24 indefensible choice of an incomparable royalty rate that
25 doesn't reflect the realities of the situation.

1 I don't recollect for certain, I did look at the
2 briefing there, I thought that briefing focused on him doing an
3 analysis without a competent universe of infringements to
4 multiple a rate by. I don't remember a challenge to the rate.
5 But fundamentally that's the issue, and the lack of a proper
6 universe makes it even worse here.

7 With respect to -- Your Honor asked the question,
8 what's the relevance of this. Of his imprimatur of Cox's
9 procedures worked well, they were effective. Mr. Buchanan gave
10 away the game when he said, we're allowed to argue this. It's
11 argument. It belongs, whether it's Mr. Buchanan or someone
12 else, in a closing argument, if anywhere.

13 And quite frankly, we think those arguments have no
14 place in the courtroom because it's not a defense that others
15 may have infringed or that others may have stopped. This case
16 is about the subscribers that they knew were engaging in
17 infringement and continued to provide service to.

18 What they want -- and he said, well, it's relevant
19 for us to talk about our policies and procedures. Well, of
20 course, it's going to come out at trial the different steps
21 they had in their process. But what's not okay is for them to
22 have experts there to tell the jury what to think about those
23 steps by dubbing them reasonable, effective, windfall. These
24 are standardless, subjective ipse dixit from these folks.

25 And we have a separate motion in limine about this

1 96 percent analysis. Which, again, we've approached
2 differently. Cox has this internal study that they prepared.
3 It's been labeled a study in Cox's summary judgment briefing.
4 Before that, it was a PowerPoint presentation prepared for
5 advocacy. And we have a motion in limine on this, Your Honor.
6 I think you'll see, there's no foundation to it. It's
7 deceptive. They don't even understand the data that they're
8 proposing -- relying on for it. And they want these experts to
9 parade it out in front of a jury.

10 Thank you.

11 THE COURT: All right. We'll look at that in limine
12 motion down the road.

13 All right. Mr. Lehr -- Dr. Lehr.

14 MR. BUCHANAN: Thank you, Your Honor.

15 You know, we move to strike most of Dr. Lehr's expert
16 report and potential testimony because his theory of damages,
17 which can be broken up in sort of three groups, one is an
18 amorphous impact and speculative of injury to artists and music
19 companies, label companies over a 15-year period due to people
20 downloading music on BitTorrent or Napster or Grokster at any
21 period in time and there was just some injury there. And he --
22 when asked to quantify it, he said, I didn't attempt to, it
23 can't be.

24 We asked, did you talk to any of the plaintiffs to
25 ask them, hey, do they have any financial data to indicate lost

1 sales or injuries or impact, board discussions, meetings among
2 people. And he said, no, I didn't even ask for any of that.

3 He cites to one document with regard to this sort of
4 generic commentary on the impact of piracy over the
5 centuries -- or decades, I should say, and that is a Warner
6 Music 10-K that just talks about, generically about the impact
7 of piracy. So it's never quantified.

8 He also -- then he says that Cox saved certain money
9 and there's certain benefit here. And this is -- I guess all
10 of this is somehow tied to the second prong of the vicarious
11 liability, this direct and obvious financial interests that
12 somehow, if you analyze it, was a draw to subscribers to come
13 to Cox because they -- all this infringement was taking place
14 and they knew they could get on there and get away with it.

15 There's no evidence or testimony about any of that.
16 I know Mr. Elkin is going to deal with that on summary
17 judgment. I know that issue barely passed muster in the BMG
18 case. And I know one of the issues there was that Dr. Nowlis,
19 I believe, had some market studies and surveys that the Court
20 said that will allow you to proceed.

21 There's no market survey here. There's no such
22 testimony that Dr. Nowlis offered in that case. And as I said,
23 Dr. Lehr here doesn't even attempt to quantify anything, any of
24 these damages. For example, he says that had Cox done certain
25 things, it could have cost them money. Such as if they

1 terminated more people, there could have been a cost in sending
2 the letter of termination. If they accepted more notices, that
3 had we mailed them, that could have cost money. We e-mailed
4 them. He said, you'd have to go pick up more modems when you
5 terminated people, on and on.

6 So I said, did you quantify any of this in any way?
7 He said, no, it couldn't be done. And he goes, I didn't -- a
8 quote, "I didn't try to specifically quantify those because,
9 you know, to come up with specific estimates of what Cox's
10 costs would be or to try to, you know, do something other than
11 what it did, I would have to have an opinion about what --
12 specifically, what they would do. I'm not offering opinion
13 about specifically what Cox should have done, but
14 specifically -- I'm not offering an opinion about what they
15 should have done, what they shouldn't have done, it's not part
16 of my testimony."

17 So he can't quantify it and he doesn't say we had to
18 do it, so I really don't see how he adds anything when he
19 testifies about that.

20 And more substantively, and this goes to the Court's
21 question about why is Dr. Weber's post hoc analysis on
22 statistics of impact of notices, he comes up with a theory
23 which he says the plaintiffs lawyers asked him to do -- and I
24 am not disparaging them on that. They asked him to do it. He
25 didn't come up with it. He said, they asked me to go look at

1 what would happen if you analyzed the revenue that came in over
2 a five-year period based on an average business customer and a
3 residential customer of Cox and if they had got one, three, or
4 five notices and they got terminated after one, three, or five.
5 So it's \$5,200 per residential subscriber, 20,000 per business
6 subscriber.

7 And they're saying, look, had they terminated after
8 one, all 57,000 subscribers, they -- it would have cost them
9 like \$300 billion in revenue over a five-year period. It goes
10 down to like 180, and then 90, and he does it in terms of
11 overall revenue. But the problem is, it's untethered to any
12 theory of liability in the case. It's just speculation.

13 And if you look at what the complaint says, it says,
14 we are seeking damages relating to notices that we sent to Cox
15 subscribers where those subscribers had received a notice from
16 us and received two others during the period January 2013 to
17 November 2014.

18 So the period of time that Dr. Lehr uses is 2012 to
19 2016. So he's saying, basically, here is an actual damage
20 model based on some theory of liability that occurred at some
21 point in time, which he doesn't really consider, and he goes
22 outside the claims period. He goes outside the fact that it's
23 three notices they're talking about and he uses one, and then
24 he does three and five. And so, he comes up with this huge
25 number.

1 And I asked him, I said, what about the person that
2 got one notice? Should that person be terminated? I have no
3 opinion. Two, three, four, five? I have no opinion about
4 that.

5 Dr. McCabe was the same way. And I just bring that
6 up because he is their liability expert on our process. I
7 asked him about all the processes, the caps, the limits, and,
8 you know, when we should terminate. He goes, I have no opinion
9 about any of those things. All I'm here to testify is that at
10 13 they should have done something. That's all. So that's the
11 liability expert.

12 Then you have got the damage expert who is totally
13 disconnected from the liability expert and the facts because
14 now he's saying, terminate at one, three, and five even though
15 he has no opinion about that.

16 So let's assume someone got a notice at the end of
17 the claims period, 2014, one notice. Some kid downloads a
18 song. The parents catch him. They call up, won't happen
19 again. They say they should be terminated and all the revenue
20 prior to that back to 2012 that they paid should be disgorged,
21 basically, that Cox received because Cox is guilty as of that
22 point in time of contributory infringement. And that is their
23 damages theory.

24 And that is just -- that is not connected to
25 anything. There is no connection to vicarious liability there.

1 In terms of that revenue has nothing to do with incentivizing
2 some unknown individual to come to Cox because there is
3 infringement on the network. That is just coming up with a
4 theory to drive up this huge number when he doesn't even defend
5 it. He just says, they told me to do it, I calculated it.

6 And the last point he makes is that he tries to
7 create this incentive to attract people. Because if you look
8 at those people that got over 20 notices, they paid \$4 more a
9 month than people who got one or two. So he's taking the
10 outlier of whom there's probably one one-tenth of 1 percent of
11 their residential subscribers that got over 20. And he's
12 saying that that is a measure somehow that people are
13 attracted.

14 But there is no evidence that those people who got 20
15 came to Cox because they could infringe. Cox didn't charge
16 people extra money if they exceeded their data allowance on a
17 monthly basis. It's a flat monthly rate.

18 Cox did not discriminate between people who got one,
19 three, five, or ten in terms of sending them infringement
20 notices or suspending them. There is no distinction between
21 them.

22 And in fact, there is no analysis of the demographics
23 behind this particular part of this report because Cox has --
24 is all over the country, and in different places there is
25 different rates per month for different tiers of packages. And

1 he never takes that into consideration to see if that makes a
2 difference between the \$4.

3 So that is totally disconnected from any theory of
4 damages. And certainly the notion that somehow that those
5 people that got over 20 notices, they paid \$4 more a month
6 because of their service, that somehow attracted people to Cox
7 with the draw, there is no testimony or evidence of that at
8 all.

9 THE COURT: All right. Thank you.

10 Good afternoon.

11 MR. GOULD: Good afternoon, Your Honor. Jeff Gould
12 for the plaintiffs.

13 I want to back up a little bit to begin, Your Honor.
14 I think you are familiar with Dr. Lehr. He testified in the
15 BMG case, but if I could just back up and remind you of --

16 THE COURT: He has been testifying for 20 years all
17 over the country, and his testimony has been largely accepted,
18 as far as I can tell, and even the broader testimony regarding
19 general impact on injury to the industry from piracy, it
20 appears.

21 Go ahead.

22 MR. GOULD: Then I won't belabor those points. I'll
23 just follow up on one thing on the general --

24 THE COURT: Well, you know, every case is different.
25 And Mr. Buchanan's point is, there is no tie-in to what

1 happened between plaintiffs and Cox.

2 MR. GOULD: So let me back up and start with the
3 broader point because I think Mr. Buchanan has not given a fair
4 characterization of the plaintiffs' theory of the case, which
5 is the defendants' continued provision of service to known
6 infringers. And he continues in each of these exercises to
7 focus strictly on actual damages in trying to find and pinpoint
8 the precise point at which something should have happened, the
9 precise point of termination, the precise point at which
10 infringement becomes attributable -- excuse me -- the precise
11 point at which culpability is attributable to Cox, the precise
12 point at which damages are attributable to infringement.

13 What he is missing in that, fundamentally, is that
14 this is a statutory damages case. And as you well know, there
15 are many factors that go into that analysis. I'll address some
16 of his actual damages points, but they are really an effort to
17 distract, I think, from much of what is relevant in this case.

18 So let's talk about his general opinion that
19 copyright infringement harms -- harms copyright holders. All
20 right. So what does he do? He explains why we don't have data
21 that allows him or you or the jury to quantify what that harm
22 is. And he does that through the lens of the economic and
23 economic literature.

24 He explains through that literature that piracy
25 causes substantial harm. And what these articles that

1 Mr. Buchanan gives short shift to do is they compile data from
2 numerous sources, including academic surveys of how many people
3 infringe and by what quantum, they use market data to assess
4 consumer behavior, and then these studies run economics --
5 regression analysis, statistical analysis, econometrics, and
6 they try to use those principles to understand the relationship
7 between infringing behavior and purchases. Okay.

8 I don't know about you, but that's not something that
9 I would understand. And it would be helpful to me, and I
10 believe to the jury, to have an expert with Mr. Lehr's -- with
11 Dr. Lehr's qualifications to be able to explain those things.

12 And, frankly, those are common uses and efforts by
13 testifying experts in these kinds of cases. He talks about
14 dozens of complicated economic articles, not a single one like
15 Mr. Buchanan says, and these articles require expert
16 interpretation. And Your Honor understood this in BMG when one
17 of these issues came up at trial.

18 And here is what Your Honor said during the BMG trial
19 at page 1099: This is right in Dr. Lehr's wheelhouse. This is
20 what he does on a regular basis as a professor in studying
21 economic effects of influences on the Internet, and he deals in
22 the economic world. So he's the first one I thought had a
23 right to come in and say, yes, this is used in the industry,
24 I'm familiar with it, and the rest of the testimony talks about
25 reliability.

1 That's what we have here. Now, there is no question
2 that the impossibility of quantifying the harm is relevant to
3 statutory damages, and I don't think even Mr. Buchanan makes
4 that argument.

5 THE COURT: Well, he says that actual damages are
6 relevant to a statutory damages analysis. What do you say to
7 that?

8 MR. GOULD: I think that if there is a reliable
9 methodology by which the jury can be presented with information
10 that would be helpful to it to understand the scope of that
11 harm, I think that's fair information for them to present and
12 we can attack it.

13 THE COURT: Okay. Go ahead.

14 MR. GOULD: I don't think that exists here for the
15 reasons that we have explained in our papers.

16 THE COURT: I understand.

17 MR. GOULD: The other thing that Cox says in its
18 papers but Mr. Buchanan didn't mention is that Dr. Lehr's
19 testimony on the nature of harm and un-quantifiability of harm
20 is unnecessary because fact witnesses for the plaintiffs will
21 testify about the harm. But that completely misses the point,
22 in my opinion. It is precisely because of the difficulty of
23 quantifying that this expert testimony is needed.

24 The fact witnesses can testify about the types of
25 harm, and they will tell you that it's hard to know by what

1 measure. And without Dr. Lehr, there is too high a risk of
2 misleading the jury. That inability by individual plaintiff
3 fact witnesses to quantify it means that there is no harm.
4 That is not appropriate here.

5 The second thing Mr. Buchanan talked about was the
6 costs saved. I want to address that specifically. Mr.
7 Buchanan says that Dr. Lehr provided an opinion that Cox saved
8 direct incremental costs -- let me back up. I apologize.

9 Dr. Lehr describes certain direct incremental costs
10 that he says Cox avoided by its handling or non-handling of a
11 proper Copyright Abuse System.

12 THE COURT: Save money.

13 MR. GOULD: Save money. He includes operating
14 expenses by running a better system. He talks about how if you
15 didn't blacklist certain senders, you would have to process
16 more notices. If you didn't cap notices, you would have to
17 process more notices. You would have to take more phone calls
18 by customer service. You would have to commission or
19 decommission more modems and the like.

20 There is reams of evidence in this case, you've
21 probably seen it, of Cox trying to stem the flow of customer
22 calls to its abuse representatives. Right.

23 So I don't hear Mr. Buchanan or Cox to argue that
24 those costs saved are irrelevant. In fact, those are factors,
25 again, that the jury can consider on statutory damages.

1 Instead, what Cox claims is that Dr. Lehr's opinion
2 is just his say so. That his opinion is Cox would have spent
3 more money if it spent more money.

4 What they're missing is what underlies those
5 opinions. Right? And he says, well, Lehr, Dr. Lehr had to
6 testify about what they should have done. And he criticizes
7 them for not calculating the actual costs. But there is three
8 problems with this, Your Honor.

9 First, Dr. Lehr's opinion is based on an assumption,
10 and that is perfectly common territory for an expert to rely on
11 an assumption to provide an opinion. And that is what he does
12 here. Which is that, assuming that these additional steps were
13 needed, which he doesn't provide an opinion that they are, they
14 would have included additional incremental costs to Cox.

15 And that's helpful to the jury because, again, there
16 may be basic macro and microeconomic principles, but it's not a
17 given that a jury understands that direct incremental costs
18 saved by an ISP by not operating a more robust infringement
19 protection system is something that comes off their bottom
20 line. That's why it's helpful.

21 Number two. As to actual costs, Cox's 30(b)(6)
22 witnesses were asked about the costs of operating this system,
23 and they didn't know. So how is Dr. Lehr supposed to do so,
24 right?

25 Matt Carothers was Cox's 30(b)(6) witness on the

1 following topic: The level of resources and staffing Cox
2 dedicated to CATS and the graduated response program, among
3 other things. The level of resources to operate this system.
4 And he was asked the following questions and gave the following
5 answers in his deposition: Have you ever done a study or seen
6 -- excuse me, on page 38 of his deposition he was asked the
7 following questions: Have you ever done a study or seen a
8 study indicating what the costs is -- what the cost is to
9 handle each abuse ticket? Answer: No.

10 Question: Have you ever done a study or seen a study
11 indicating what the time is that it takes Cox to deal with each
12 ticket? Answer: No, I haven't.

13 Then let's turn to Sanford Mencher, that is Cox's
14 30(b)(6) witness on topic 1, Cox's revenues, expenses and
15 profits. And during that deposition we were looking at Cox's
16 profit and loss statement identifying the specific breakdown of
17 costs, revenues, and the like for its data, its phone, and its
18 video services. It's an exhibit you saw at length in the BMG
19 trial. You may see it again here.

20 And here is what I asked Mr. Mencher. Question: Is
21 there an expense item on Exhibit 3 showing the Safety and Abuse
22 Team? That's the team that handles these things. Answer: No.

23 Question: What report could we look at to identify
24 the costs associated with the Abuse Team? Answer: I don't
25 know. I don't know if the safety -- what did you call it?

1 Safety and Abuse Team? I'm sorry, what did you refer to it as?

2 He then goes on in the next pages to talk about the
3 many steps that he would need to take internally, the layers of
4 expense and finance folks in his operation that he would need
5 to explore, try to unpack, try to identify if the Safety and
6 Abuse Team has an expense line item, was it part of the general
7 corporate expenses? Could it be broken down?

8 So for Cox to come in and say that -- criticize Dr.
9 Lehr for not quantifying it or calculating it when Cox itself
10 couldn't do so, is, frankly, not a helpful criticism.

11 Lastly, Dr. Lehr did consider the information that
12 was available to him, but it still doesn't quantify the issue.
13 He looked at an exhibit from the Matt Carothers' deposition
14 that discusses the costs of handling an abuse ticket as \$4.98.
15 That is part of his testimony by reference to the exhibits and
16 information that he considered. Although, he didn't call it
17 out specifically, that underlies his opinion.

18 Even if you assume that's the quantum of costs saved,
19 \$4.98 per ticket not processed because of their rigged system,
20 it still doesn't answer the question or allow you to calculate
21 the overall costs saved. And that's because, like many of the
22 things here, we just don't know how many tickets went
23 unprocessed because of the millions blocked by Rightscorp for
24 blacklisting because of the who knows how many others that
25 exceeded the caps, hard limits, the way that they bundled

1 tickets, bundled notices and individual tickets and the like.

2 I want to turn now to the next opinion that
3 Mr. Buchanan discussed, and that's the lifetime value
4 calculation.

5 So backing up a little bit, Your Honor, Mr. Lehr --
6 excuse me, Dr. Lehr provides an opinion that -- let me back up.

7 He considered the economic incentive to tolerate
8 infringement, including by repeat infringers, and he did that
9 in several ways. Mr. Buchanan talked about a couple of them,
10 but I want to list them for you.

11 So he looked at the revenue from the customers that
12 infringe plaintiffs' copyrights, including after their
13 infringements -- their notices of infringement to those
14 customers. He looked at the average lifetime value of a high
15 speed Internet customer and did a profit calculation from the
16 time frame at issue. He looked at the costs saved, which I
17 just discussed. And he also demonstrated that infringing
18 subscribers are more profitable on average.

19 And I want to remind Your Honor that in the BMG case
20 you permitted Dr. Lehr to testify about the economic incentives
21 to tolerate infringement. And he did provide a lifetime value
22 calculation, and he did multiple it by the number of alleged
23 infringers in that case based on a calculation that one of the
24 other experts had provided. So Cox made similar arguments on
25 their Daubert motion there. Those were overruled and Dr. Lehr

1 testified.

2 Now, as for the opinion on economic incentive, he
3 provides two calculations of what Cox earned from those
4 subscribers. One is based on actual billing data from those
5 particular infringing subscribers. And two is based on his
6 calculation of an average lifetime value of a Cox subscriber.
7 Both of those are important to the statutory damages, and both
8 of those are important for vicarious liability.

9 So let's touch on damages. Again, Cox has asked you
10 to limit the information that Dr. Lehr can present to that
11 strictly, solely, and only attributable to infringement. I
12 don't need to belabor it, but that's too narrow. The jury can
13 consider many other things on statutory damages, deterrence in
14 particular, and even penalty. They're related, but the
15 deterrent effect is important.

16 And in order for a jury to come up with an adequate
17 deterrent, it certainly needs the context of what's going on
18 here? What is the level of activity? How much is Cox earning
19 by providing service to all of these subscribers, whether they
20 have one or 20 or 2,000? It's -- the opinion is that they have
21 economic incentive to tolerate infringement. And so, the jury
22 should know the value of those subscribers to Cox in total.

23 THE COURT: Is he going to break out the -- you know,
24 the infringement claim period versus his other financial
25 information? It was a little confusing in his expert report.

1 MR. GOULD: So we're still refining what that'll look
2 like. The opinions that we -- that I anticipate that he will
3 give are, one, big picture, who is Cox? In terms of the
4 financial picture, what does Cox make? He will talk about the
5 average, we believe, we're still puzzling over it, but we
6 believe the average value of a customer at this time. And he
7 will give the jury, he'll equip the jury with several ways to
8 examine that. One as an -- the value of an individual
9 subscriber. What does Cox think of as a valuable subscriber
10 when it implements a policy to keep or not keep or enforce or
11 not enforce? And then he's going to, I believe, calculate that
12 against several bodies -- several subsets of groupings.

13 And what we've put forth -- what he's put forth in
14 his reports is the value of subscribers who infringe once, the
15 value of subscribers that infringe three times, and the value
16 of subscribers that infringe five times. And I don't know, as
17 I sit here today, whether his testimony will be limited to --
18 well, it will be limited by the data that Cox has produced
19 about its infringing subscribers.

20 What Cox has produced is data for infringement from
21 2012 to 2014 for 57,000 subscribers. So that's the body that
22 we'll look at. So the average lifetime calculation isn't
23 really a time-based analysis.

24 THE COURT: Right.

25 MR. GOULD: Other than the fact that he's looking at

1 the average value of a subscriber in 2014.

2 THE COURT: Yeah, I just don't want it to be blurred.
3 I want a jury to be able to understand what he's talking about,
4 right?

5 MR. GOULD: Yes. Yes, Your Honor, I agree.

6 THE COURT: All right.

7 MR. GOULD: And then the second calculation he does
8 is based on Cox's actual billing data. That can be more
9 precisely tailored by time. And the parties have a dispute
10 about what's relevant and how much weight to give it. The data
11 that they've produced for billings runs from, I believe, 2012
12 to 2016.

13 So Magistrate Judge Anderson gave us a little bit of
14 runway before the claim period to get a look at what the
15 billings and revenue history were for these at-issue
16 subscribers leading up to the claim period. And what we've
17 done, what Dr. Lehr has done is looked at how much Cox
18 collected from those.

19 Now, I believe that his testimony on that front will
20 begin with the claim period. And so, he'll look at it from the
21 claim period forward. And there's the question of -- I think
22 the parties, again, have a dispute about whether that period
23 should end with the claim period or thereafter. And, you know,
24 I think --

25 THE COURT: We'll get to that in a couple of weeks.

1 MR. GOULD: We'll get to that in a couple of weeks.
2 Thank you. But certainly, we will, mindful of this discussion,
3 be certainly clear that Dr. Lehr's testimony is clear as to
4 time and what it's purporting to characterize.

5 Now -- so damages, I think I explained why that
6 calculation is relevant to damages. And then, you know, Cox is
7 also wrong, in our opinion, on his opinions on both average
8 lifetime value and actual billings. Those are also relevant to
9 vicarious. They go to the financial benefit prong.

10 And my colleague, Mr. Oppenheim, is going to speak at
11 greater length about the standard under vicarious, so I won't
12 belabor it. But Cox was collecting money hand over fist from
13 subscribers that it knew -- well, had reason to believe, knew
14 were infringing.

15 And Mr. Buchanan wants to ascribe to the plaintiffs
16 the legal position that the case turns on the moment at which
17 they should have terminated. You know, I think it's for the
18 jury to decide what Cox should have done with the information.
19 And that's why the one, three and five counts are relevant,
20 because the jury would be perfectly within its right,
21 regardless of our theory of the case, as to say, you know what,
22 they knew so much, that the minute they got a first one, they
23 should have done something. You know, okay, we'll give them a
24 break. After three, they should have done something. Okay.
25 Well, after five, they certainly should have.

1 So, you know, it -- I think it's -- it doesn't
2 accurately characterize the position. But that's why those
3 one, three, and five quantifications are relevant.

4 There's a lot of talk in the papers about a failure
5 to show a nexus. Again, I think the problem there is that it's
6 really relying strictly on an actual damages analysis, which is
7 too narrow a lens for this. I won't belabor it, but Dr. Lehr
8 opines that there is a direct relationship, attributable
9 relationship between the infringement particularly at this
10 level with the benefits of having a larger subscriber base,
11 higher total revenues, and higher profits. And those are all
12 things that he opines on and calculates.

13 Now, the last thing Mr. Buchanan talked about is
14 another economic incentive argument where Mr. Lehr -- Dr. Lehr
15 calculates a statistically significant difference in billings
16 and payments between infringers with 20 or more -- 20 or more
17 tickets on one hand and one to two infringement tickets on the
18 other, and wants the jury to be without that really helpful,
19 relevant information.

20 And I want -- so I just want to explain what that
21 opinion is and what went into it, because I think it's helpful
22 in understanding it.

23 THE COURT: Go ahead.

24 MR. GOULD: So Dr. Lehr looks at a body of evidence
25 that leads him to conclude that on balance infringing

1 subscribers pay Cox for higher bandwidth. He bases that on
2 several factors, including the undisputed fact that
3 peer-to-peer use generally consumes higher bandwidth, Cox
4 documents and internal analysis showing that peer-to-peer use
5 was a key driver of bandwidth by its customers during this
6 exact time frame, and the scope of prices that Cox charged to
7 its customers for different levels of service.

8 And to test that theory, what he does is he went to
9 the actual billing data. You're going to hear all about ICOMS
10 data. ICOMS is their billing database. So he looks at the
11 ICOMS billing data, the same billing customer information that
12 I've been discussing, and he says, okay, let's test this.
13 Let's look at the relative payments for data by these customers
14 who infringed a lot versus these customers who infringed a
15 little bit.

16 And I want to qualify that a little bit. So all we
17 have is a glimpse in time of 2012 to 2014. For all the reasons
18 we've described in a million places, we think the scope of
19 infringement was much higher. When I talk about this, I'm
20 looking at the limited snapshot.

21 So he looks at the data they've produced for
22 customers for whom we have billing data and infringement ticket
23 data. And he says those with 20 or more were billed, on
24 average, 8.4 percent higher than those with just a few notices.
25 That's a statistically significant difference, number one. And

1 number two, it's a -- it supports the inference that higher
2 level -- higher infringers were paying for higher bandwidth.
3 And that, again, touches on the direct financial benefit.

4 The rest of Cox's criticism on that in the papers,
5 Mr. Buchanan didn't talk about them, but as we explained in our
6 opposition, we think those go just to weight.

7 THE COURT: Let's finish up.

8 MR. GOULD: Thank you, Your Honor.

9 THE COURT: All right. Thank you, Mr. Gould.

10 Mr. Buchanan.

11 MR. BUCHANAN: I'll be quick, Your Honor.

12 As to the last point about the difference between the
13 monthly rate, someone that has one or two versus 20, I meant --
14 they basically say it's just being helpful, there's good
15 inferences there. Everything that Mr. Gould just said is that
16 it could be helpful to the jury. Well, it would be helpful to
17 their case to put everything in the world there, but is it tied
18 to some theory of liability.

19 They keep talking about damages and statutory
20 damages. Before you get to damages, you've got to get by
21 liability.

22 So how does this notion that some people paid -- that
23 got 20 or more notices paid, in some parts of the country, \$4
24 more a month than someone that got one or two, have to do with
25 whether there was a draw, a draw to subscribers to join the

1 network at Cox because they knew there was infringement?

2 There's zero.

3 It's the same with their argument about one, two, and
4 three. They say it's relevant to vicarious liability and
5 statutory damages, but it's not related to -- relevant to
6 vicarious liability. There's nothing to do with drawing people
7 there. It's just -- they're just saying that everyone who got
8 one notice of infringement should be terminated. And that's a
9 problem. That goes back to what we were talking about,
10 whether, you know, Dr. Weber's data is relevant that there was
11 a runoff. Because they would love not to have anyone see that.
12 So they can say these people, these 57,000 customers, they each
13 got at least three notices of infringement from the plaintiffs
14 or some other content owner. And they were never terminated,
15 they just did it forever. We have no idea what happened to
16 them. They equate notices with infringement.

17 And then you heard Mr. Gould say, we're going to
18 argue to the jury that even at one, at one notice to some
19 university -- or actually, we'll just take a real example. An
20 ISP in rural Oklahoma created by the Department of Agriculture
21 with tens of millions of dollars to bring broadband to rural
22 Oklahoma people, and they had -- they're the ones -- they're
23 one of the ones that they've identified in their complaint as a
24 serious infringement that should have been terminated.

25 So they're saying that entire rural community should

1 have been one notice. We should have shut down the whole
2 community. The hospital, the police station, everything.
3 There's 3,000 business customers.

4 So how -- I don't see any articulation by the
5 plaintiffs that there's any theory whatsoever, any case law,
6 any statute that would support that you could argue to a jury
7 that after one notice, that that constitutes an infringement
8 and you should shut those people down.

9 And again, he says, we're going to be refining it,
10 we're working on it, we're crystalizing it. That's not -- that
11 is a sign that they -- of weakness. I mean, that is a sign
12 that there's problems with this theory. They have stated what
13 they're going to do. How are we going to find out what their
14 theory of damages is at trial?

15 So I think that -- and one final point is, again, you
16 need to establish liability first. So when they talk about all
17 these incremental costs of Cox, which, you know, I meant, they
18 need to show that in fact we should have had to do those.
19 Right? You can't say, I don't care if they did or didn't do
20 them. But if they did do them, it would have cost some money,
21 which I didn't quantify because I'm not giving an opinion.

22 And McCabe is the same, no opinion about any of these
23 aspects of the process of our system to try to stop
24 infringement.

25 THE COURT: All right, thank you.

1 Let's take a brief recess.

2 MR. OPPENHEIM: May I make one very quick comment?

3 THE COURT: Yes, sir.

4 MR. OPPENHEIM: Mr. Buchanan's characterization of
5 the plaintiffs' position of shutting down Internet in the State
6 of Oklahoma is not our position. We've never said anything
7 remotely like that. And I want the record to be clear that
8 that's not where we stand.

9 Thank you, Your Honor.

10 THE COURT: Okay. Yeah, thank you.

11 All right. Let's take ten minutes. We're in recess.

12 NOTE: At this point a recess is taken; at the
13 conclusion of which the case continues as follows:

14 THE COURT: All right. Let's hear Sony's motion for
15 summary judgment first, please.

16 MR. OPPENHEIM: Thank you, Your Honor. Cox's
17 wholesale indifference to copyright infringement on its network
18 has been well storied by this Court already. And as we dig
19 into the detailed elements of the plaintiffs' claims and Cox's
20 defenses, Cox will no doubt want to avoid any discussion about
21 many of the facts that it does not like.

22 Indeed, what we've seen already is Cox seeks to
23 rewrite the story of what it did, what the music industry did,
24 and what the copyright laws are.

25 THE COURT: So I read your pleadings. I understand

1 we're focusing on ownership. And it took up a big part of our
2 case with BMG. And I made the rulings that I made in that
3 case.

4 So I think I understand. And if you want to point
5 out what you think are new issues that I need to look at
6 carefully and/or why some of my prior rulings as to the manner
7 in which Sony and the other plaintiffs have shown ownership,
8 that would be helpful.

9 MR. OPPENHEIM: So, Your Honor, I'll leave to
10 Mr. Zebrak at the end, the ownership issue, if that's all
11 right. And I would like to turn to the issues of the
12 underlying direct infringement and the knowledge and financial
13 benefit.

14 THE COURT: Okay.

15 MR. OPPENHEIM: So, Your Honor, on those issues, I
16 know we -- we kind of hit in pieces in the Daubert motions what
17 it is MarkMonitor and Audible Magic did. I would like to kind
18 of just -- let's have a very clear understanding of what
19 happened here because I don't think it's come out quite right
20 yet.

21 THE COURT: Well, it depends on how long that is
22 going to take.

23 MR. OPPENHEIM: I will try to do it very quickly,
24 Your Honor.

25 So, MarkMonitor used a process that was very similar

1 to other vendors, including in some ways what Rightscorp did.
2 Beginning as early as 2008, MarkMonitor went on to peer-to-peer
3 networks to identify files that were being infringed. And they
4 would download those files and submit those files to Audible
5 Magic to determine what was in those files and whether they
6 were infringing.

7 Audible Magic would return data to MarkMonitor.
8 MarkMonitor would record in its database the artist, track, and
9 album.

10 Now, starting in 2015, after the claim period for
11 this case, MarkMonitor started recording other data as well,
12 not for purposes of what it was doing for the music industry,
13 but for other potential clients. And that has been explained
14 in the affidavits of Sam Bahun.

15 If that information was recorded in the MarkMonitor
16 database, that is the artist, the album, and the track, that
17 was deemed to be an accurate identification because otherwise
18 they wouldn't have the information. And that information was
19 stored in the MarkMonitor database.

20 All of that information associated with each of the
21 claims in this case has been produced in a spreadsheet that the
22 plaintiffs produced that was obtained from MarkMonitor. Okay.
23 That, Your Honor, is -- I want to make sure I get my numbers
24 right here. It's the --

25 THE COURT: '431.

1 MR. OPPENHEIM: '431, right. Now, that is the --
2 that evidence -- the evidence from that spreadsheet is before
3 the Court, there is a foundation for it, witnesses have
4 testified to it, and I can explain to you exactly what's in
5 there.

6 The other two spreadsheets that we've been talking
7 about today do not play a role and do not create an issue of
8 fact for purposes of summary judgment for this Court. So the
9 REV '3444, the Audible Magic spreadsheet, is not before the
10 Court for purposes of summary judgment. The defendant has laid
11 zero foundation, nor could they lay a foundation for it.

12 The reason you put a document in front of a witness
13 in a deposition to get it authenticated is so that both sides
14 can ask questions about it and create a record. Cox did not do
15 that. And had they, they would have gotten a clear explanation
16 about what REV '3444 was and why it can't be the basis to
17 dispute MarkMonitor's data.

18 So they have no foundation for it. The Court struck
19 the declaration of Mr. Kearney which tried to put it forward.
20 It's not before the Court for purposes of summary judgment.

21 The other document, '236, I believe, the MarkMonitor
22 spreadsheet, has all the exact same information that is in
23 '231, plus additional information.

24 Now, that additional information does not create an
25 issue of fact. That additional information was information

1 that was collected later in time and has -- and if you look at
2 the spreadsheets that Mr. Buchanan gave you -- and, by the way,
3 we went through this with Judge Anderson at great length a
4 week-and-a-half ago, almost two weeks ago. That information is
5 information that was -- does not in any way reflect that the
6 other information in '431 is inaccurate.

7 So, for example, where it says, match duration, -1,
8 obviously there is not a -1 second match duration. That would
9 be an impossibility.

10 Now, Cox has put forward attorney argument that says,
11 well, if it says -1 or 0, it must mean that there was no match.
12 They have no foundation for that. They have no testimony for
13 it. They didn't ask the witnesses about it. All they have is
14 the attorney argument on it. That's all they have.

15 Now, in the motion in limine that is before your
16 court, Sam Bahun, the MarkMonitor rep, who, if he had been
17 asked in deposition, would have said this, but he now says it
18 in a declaration, he said that MarkMonitor was in the process
19 of refining its databases and the engineers had 0s and -1s put
20 in those places because the data wasn't transferring and it was
21 obviously a void for the data.

22 So the only evidence that is before the Court for
23 purposes of plaintiffs' motion on summary judgement of direct
24 infringement in terms of the Audible Magic confirmations is the
25 one spreadsheet, and that one spreadsheet is unambiguous as to

1 the works in suit. Now -- so that speaks to the issue of the
2 Audible Magic data.

3 But the Court has before it lots of other evidence of
4 the infringements. And it is not a making available issue,
5 Your Honor.

6 So the evidence that is before the Court on
7 distribution includes MarkMonitor's detailed log files, the
8 evidence captures, the Audible Magic confirmations which we
9 just spoke about, testimony describing the process of
10 collecting this evidence, evidence describing the process of
11 sending the notices, and testimony of Barbara Frederiksen-Cross
12 who reviewed the MarkMonitor system and confirmed that it does
13 exactly what it says it does.

14 Now, what does that system do? It is not simply
15 going onto a network and looking to see if there is somebody on
16 that network with a file. It is doing well more than that,
17 Your Honor.

18 When MarkMonitor goes onto a peer-to-peer network, it
19 is connecting to a user who has the infringing file on the
20 network. It connects to that user and it initiates the process
21 under the peer-to-peer protocol to obtain the file. It
22 collects the IP address, it collects the hash of the file.

23 THE COURT: That's the handshake, you know.

24 MR. OPPENHEIM: The handshake. You've got it. All
25 of that.

1 THE COURT: Yeah.

2 MR. OPPENHEIM: Now, Your Honor, that is enough to
3 show distribution under Hotaling. And I am going to get to
4 that in a minute.

5 But it's important to understand that this process of
6 connecting with this person is not simply observing as though
7 somebody may theoretically be out there distributing. They
8 actually connect to them and begin the process. It is akin,
9 Your Honor, and I can't help, given the fever in the city right
10 now, to say it's akin to saying, I had a World Series ticket.
11 I went into the ballpark. And Cox saying, yeah, but we don't
12 have proof you watched the game.

13 Now, I read at great length the argument on Hotaling
14 before this Court in the BMG case. And having spent the better
15 part of my career as a copyright lawyer, I found it very
16 interesting that the entire discussion was about whether or not
17 there was a making available right or not.

18 Hotaling, as you read it, not once in Hotaling do the
19 terms "making available" appear. It is not a case about making
20 available. It is a case about what is the quantum of proof
21 that is necessary to show distribution. That is entirely
22 different than a making available right under WIPO.

23 Now, we could talk about making available, but we
24 don't need to because Hotaling is the law, and it is the law of
25 this circuit and it's the right law. And under Hotaling, what

1 the Fourth Circuit said is, when you can't have sufficient
2 proof of distribution, if you see everything up to the point of
3 distribution, that can be deemed distribution.

4 That's good law in this circuit. And you couldn't be
5 closer to that circumstance than what we have here in this
6 case.

7 Peer-to-peer networks have been created so that the
8 only people who can see what's happening as between peers are
9 the peers. And so, there is no way that MarkMonitor could go
10 onto a network and see Cox's subscribers distributing the files
11 to others.

12 Now, Cox complains, well, MarkMonitor should have
13 downloaded the files themselves. And then they say, yeah, but
14 that -- even that wouldn't have been enough.

15 So under Cox's view of the world, you could never
16 have enough evidence to show that a Cox subscriber was engaging
17 in infringement. That, of course, can't be the law.

18 So MarkMonitor goes on the network, finds the Cox
19 subscriber actively providing this file to others, that is
20 under Hoteling enough.

21 If the P2P networks had created and maintained log
22 files, then we would have them and we would put them before the
23 Court.

24 If Cox, once it had received a first notice that a
25 subscriber was infringing, decided to observe whether or not

1 that subscriber was continuing to use a P2P network, which they
2 have the technology to do, then we would have those records.
3 They didn't do that.

4 The plaintiffs collected the evidence they could
5 collect. Now, the defendants say, well, you could have paid
6 more and had MarkMonitor do more. There are limits to what you
7 can do in terms of collecting evidence. There are limits to
8 what you can collect. What was collected is enough and has
9 been enough in other courts.

10 So I've discussed the distribution aspect, but I
11 really want to focus for a minute on a reproduction piece. The
12 defendants want to characterize that the evidence that the
13 plaintiffs have shows merely that the Cox subscriber had a
14 recording in a share directory and nothing more.

15 This is a speculative argument. They don't have a
16 basis for this, and there are two reasons that the argument has
17 no legs. So plaintiffs have put forward evidence that over
18 57,000 Cox subscribers on peer-to-peer networks had a file that
19 MarkMonitor had previously identified as infringing that had
20 the same hash as a file that MarkMonitor had previously found.

21 As the expert -- as Barbara Frederiksen-Cross
22 explained in her expert report, when confronted with identical
23 content items being shared by multiple users on a peer-to-peer
24 file-sharing network, it is overwhelmingly likely that the
25 users have copied the files from each other.

1 And the reason this is is because hashes are unique.
2 Dr. Feamster testified to that in his deposition. Yes, in a
3 footnote in their brief they now say there's a theoretical
4 possibility that it didn't happen -- doesn't happen. We can
5 ignore that.

6 This is akin to a teacher walking into a classroom
7 and collecting essays from students, and all of the essays are
8 exactly the same. And the teacher being told, no, no, no, they
9 were all independently created.

10 It's not a possibility, Your Honor. In considering
11 summary judgment, don't leave reasonableness at the door.
12 These arguments are just speculation.

13 Secondly, many of the subscribers who were caught
14 didn't have the complete file. And there's some confusion over
15 this argument in plaintiffs' brief, so I want to clarify it.

16 Plaintiffs' expert pointed to two examples of a -- of
17 two Cox subscribers who were caught in two different instances
18 with the exact same hash file, but different quantum of the
19 bitfield.

20 So imagine -- and I don't have the exact numbers in
21 front of me. But on day 1, 90 percent; on day 5, 95 percent.
22 That shows that that user is in the process of reproducing the
23 file. That's clear and unequivocal evidence of that.

24 Now, any user who is -- and that's just two examples.
25 But any user who has less than 100 percent of the file, and has

1 it in their share directory, and is on the network, is in the
2 process of reproducing it. And roughly 15 percent of the users
3 who were caught had less than 100 percent of the file and were
4 caught reproducing it. This is unequivocal, unrefuted evidence
5 of reproductions occurring by Cox subscribers.

6 Your Honor, before I go on to the knowledge issue, I
7 want to speak to Cox's argument about direct infringement by
8 Cox business subscribers can't count as an underlying direct
9 infringement.

10 First, we've got to understand the context of this,
11 Your Honor. Cox is desperate to get the infringement by its
12 business subscribers out of this case. Cox's original policy
13 with respect to business subscribers was that it would
14 terminate after three -- four notices, excuse me,
15 automatically, every business subscriber, as it would
16 residential.

17 Cox changed its policy to say it would never
18 terminate a business subscriber, period, under any
19 circumstances. And what that led to is situations like we have
20 in this case. There were business customers who, in a very
21 short period of time, were the subject of over 4,000
22 infringement notices.

23 Cox's argument is that their business subscribers
24 should have a license to infringe as much as they want and Cox
25 shouldn't have to do anything about it. And these subscribers

1 were making Cox the most money. They were paying between 30
2 and \$120,000 a month, Your Honor. So they're desperate to get
3 these subscribers out of the case. And so, they point to this
4 Cobbler, case.

5 And this Cobbler case, Your Honor, is largely a
6 direct infringement case. That part of the case has nothing to
7 do with this case.

8 But with respect to the secondary liability part of
9 the case, the Ninth Circuit looked at it and said that the sole
10 allegation was that the nursing home had failed to police its
11 WiFi service. One sentence. That was the sole allegation for
12 its secondary liability complaint. And the Ninth Circuit said,
13 you know what, that's not enough to sustain a secondary
14 liability claim.

15 I agree with that. I think we should all agree with
16 that. But the ISP -- the nursing home was not an ISP. And Cox
17 here, we -- way more than one sentence in our complaint about
18 their failures here, Your Honor.

19 The Cox business subscribers infringed, Cox doesn't
20 dispute that. What they're asking this Court to do is create
21 an immunity for them and the business subscribers to infringe
22 all they want.

23 Now, the reality is that those business subscribers
24 are subject to terms of use. They have a contract with Cox.
25 That contract requires them to abide by the Acceptable Use

1 Policy. And to the extent that they have their own
2 subscribers, like the situation Mr. Buchanan was just
3 describing where it was another ISP, Cox requires that other
4 ISP to impose the same obligations on its users. They have a
5 contractual way to deal with this, and they should enforce
6 their contract. They should not be allowed to not enforce
7 their contract.

8 Your Honor, I would put forward that the Cobbler
9 argument here can be ignored.

10 Let me turn to the knowledge issue on contributory
11 infringement. Even with the caps that Cox put into place, the
12 plaintiffs sent Cox over 200,000 notices. Cox was put on
13 notice of specific instances of infringement. Those notices
14 provided the specific user, by virtue of an IP address, that
15 was infringing, the specific date and time of the infringement,
16 the network that the user was using to infringe, the name of
17 the file that was infringing, and a representative copyrighted
18 work from that file.

19 Now, the reason I ticked through those elements is
20 because those are the elements that Cox requires in a notice,
21 and that's what the music industry did.

22 So the defendants say, well, that's insufficient
23 under the Fourth Circuit standard that comes from the BMG case.
24 But that Fourth Circuit standard, they read into it way more
25 than is there. There are only two relevant sentences from that

1 decision for the purposes of notice. The first is whether or
2 not the defendant was put on notice of specific instances of
3 infringement. Well, that absolutely happened here, couldn't be
4 any closer.

5 And then the Fourth Circuit said that the defendant
6 must have specific enough knowledge of infringement that the
7 defendant could do something about it. Again, check that box,
8 Your Honor. The plaintiffs did that.

9 Cox says, well, you didn't list every work that was
10 infringed in the notices. Cox didn't require it by its own
11 policies. And even if they had, the Fourth Circuit doesn't
12 require it.

13 Cox, when it received a notice of infringement,
14 didn't care whether what was being infringed was Bruce
15 Springsteen's Born to Run or The Lion King. They didn't care.
16 The underlying work that was infringing was irrelevant to them.

17 So they now want to use that as a basis to try to
18 escape liability because they say not every work was listed.
19 The Fourth Circuit doesn't require it, and their own policies
20 don't require it, and their own procedures don't require it.

21 Your Honor, on the issue of material contribution,
22 all I can say is I think the Court's well familiar with that.
23 I'm happy to address it in greater detail, if you'd like, but
24 I'll move on to financial benefit.

25 THE COURT: Yeah, go ahead to financial benefit.

1 MR. OPPENHEIM: So I originally contemplated starting
2 with the facts here, but I think it's important to actually
3 start with the law, because I think the law has been turned on
4 its head in this area of the law, and in particular in the
5 briefing here.

6 So the roots of vicarious liability derive from
7 respondeat superior, Your Honor. Obviously, you know, in a
8 respondeat superior case, you don't need to prove draw. And
9 similarly, you don't need to prove draw in the early vicarious
10 liability cases.

11 So the touchstone, cornerstone case on vicarious
12 liability is Shapiro, Bernstein versus Green. This is the case
13 that the Supreme Court cited to in Grokster roughly ten years
14 ago. And what happened in that case, right, is that a store,
15 the H.L. Green store, had a concessionaire within it that was
16 selling records that included some bootlegged pirate records
17 and some not bootlegged records. And what the Second Circuit
18 held was that that concessionaire could be held liable --
19 excuse me, that store could be held liable for the sale of the
20 records by the concessionaire. And the reason they could be
21 held liable is because they got a percentage of the gross
22 revenues.

23 Now, they got a percentage of the gross revenues from
24 all of the records, infringing or not. And the Court still
25 held that they could be held liable. And that's the case that

1 the Supreme Court just cited to in the Grokster case.

2 Now, the first time the issue of draw comes up in any
3 cases, as far as I know, is in the Fonovisa versus Cherry
4 Auction case. And in that case, it was a swap meet. And
5 Fonovisa, a Latin record company, sued the swap meet operator
6 because there were so many booths within the swap meet that
7 were selling pirate copies of their Latin music.

8 And initially the District Court said, no, you cannot
9 hold the swap meet operator liable because all they're doing is
10 taking money at the entrance when people come in, booth fees,
11 parking fees, and concession fees. And they said that -- you
12 can't show that it's direct enough.

13 And what the Ninth Circuit said is -- it said, no,
14 it's not just looking at whether you can tie money to the
15 infringement. If the infringing behavior was a draw to
16 customers generally, that also shows financial benefit.

17 So it was an alternative way of showing financial
18 benefit, and that's what happened in the Cherry Auction case.

19 Now, Ellison, which this Court has discussed --
20 Ellison was a case which is 100 light-years away from what we
21 have here. In Ellison there was a science fiction author who
22 sued AOL because AOL subscribers could go onto AOL, and among
23 the many, many things they could do, they could go onto Usenet
24 and then onto a Usenet channel where they could theoretically
25 get an infringing copy of his book. And he said, that's enough

1 because the subscribers are paying for the totality of the
2 service, and AOL is making money off that, and the subscriber
3 could go and get infringing material.

4 And the Ninth Circuit said, no, that's not enough.
5 And obviously what the Ninth Circuit is saying there is that
6 the tie between the infringement and the money is not direct
7 enough. That's what Ellison stands for.

8 Now, in our case, what we've put forward in our
9 papers is that there are 57,000 or 33,000, count however many
10 subscribers you want who were infringing, which at some point
11 in time Cox should have done something about. And we don't
12 need to articulate when. That'll be up to the jury to decide.
13 We believe Cox knew about infringement, they had an obligation
14 to stop it at some point in time.

15 Instead of terminating those infringers -- and the
16 e-mails internally are clear as day on this -- they chose to
17 keep them up or reactivate them and collect the money. And
18 their own internal people say this is why they did it.

19 So our theory of financial tie here is not a long
20 stretch as in Ellison. Our financial tie here is the monies
21 that Cox collected, not from all of their subscribers who
22 theoretically could have infringed, but from identified, known,
23 specific infringers who they should have done something about.
24 And it's hard to imagine a closer tie than that, Your Honor.

25 And so, I believe that the facts that we've set

1 forth, they can't refute. And it does establish as a matter
2 for summary judgment purposes liability.

3 Now, I'm going to close on this note, Your Honor.
4 There are lots -- there's lots of evidence before the Court.
5 Some of that evidence is direct and some is circumstantial.
6 But those two types of evidence are viewed equally by the
7 Court. And you can succeed on a motion for summary judgment on
8 circumstantial evidence as much as direct evidence.

9 The only question is whether defendants have contrary
10 evidence, not arguments, but contrary evidence. And I put
11 forward, Your Honor, that they don't. Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 Do you want to do the ownership issue?

14 MR. ZEBRAK: Yes, Your Honor. I'll be very brief
15 with this, unless the Court has any questions.

16 Our position is that the defendant has not created a
17 genuine issue of material fact for trial. This is our
18 business. We work with these artists and songwriters to
19 create, promote, and distribute these works. It's our regular
20 corporate policy and practice to acquire ownership or exclusive
21 rights. We submitted very detailed declarations and a mountain
22 of documentary evidence.

23 For the high majority, Cox made no attempt to even
24 contest them in light of Your Honor's judicial notice ruling.
25 I believe they have argument in their brief for about 1,500.

1 And with the Court's permission, I'll just very quickly tick
2 through those by category.

3 THE COURT: You know, why don't you -- why don't I
4 just let you respond to Cox's arguments that your documentation
5 is insufficient. All right?

6 MR. ZEBRAK: Yes, Your Honor. That's one of the four
7 areas in their brief that they raise.

8 THE COURT: Okay. Go ahead. Go ahead.

9 MR. ZEBRAK: And in -- and on that front, first of
10 all, their brief is conclusory that -- you know, they haven't
11 cited to any documents. They've cited to the stricken Lane
12 declaration by referencing 150 some-odd paragraphs.

13 So, you know, I put forward that they haven't, you
14 know, actually created a genuine issue.

15 But taking a step backward, even had they approached
16 this properly, there's no rule that every fact needs to be
17 substantiated with a document. Evidence comes in in many
18 forms. And you know, if one takes it to its extreme, you know,
19 there's no limit to what you then have to provide documentation
20 for.

21 In the BMG case, in fact, Your Honor recognized that
22 testimony can be used for aspects of chain of title, and it's
23 not a lawful proposition. Other courts, including the LimeWire
24 court, have done the same. These are not facts, by the way,
25 for which there is any dispute. There is no issue about

1 whether a certain acquisition occurred or whether a certain
2 name change occurred. This is minutia that, you know, Cox is
3 just attempting to quibble with whether in a multistep chain of
4 title we have put forward a document to prove every step of the
5 way. But the point is, there is un-rebutted declaration
6 testimony establishing these facts.

7 And on top of that, had Cox actually had a genuine
8 concern about this, they could have come forward with proof by
9 asking questions at deposition. They -- you know, we had to
10 prepare and put up these ownership deponents after producing
11 all this evidence, and they largely didn't touch these issues.

12 And so, you know, given that the law allows us to use
13 the combination of documentary and testimonial, we think it's
14 fine and well supported by case law.

15 THE COURT: All right. Thank you.

16 MR. ZEBRAK: Thank you.

17 THE COURT: All right. Mr. Elkin.

18 MR. ELKIN: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. ELKIN: I guess you figured out so far that Cox
21 and the plaintiffs have quite a number of disputes, but I think
22 one of the things we could probably agree upon is the fact that
23 we both appreciate all of the time that you and your clerks
24 have put into preparing. We know that we've put a lot of paper
25 before you, and thank you for all of the work and giving us as

1 much time as you have today.

2 THE COURT: All right.

3 MR. ELKIN: There are four, four discrete areas that
4 I would like to address, and then I'll comment on various
5 points that have been raised by counsel in connection with
6 their summary judgment argument. The first is the plaintiffs'
7 proof of direct infringement.

8 Secondly, the direct financial benefit of the
9 vicarious infringement claim.

10 The third, contributory infringement issues
11 pertaining to the non-specifically noticed works and the
12 business subscribers that Mr. Oppenheim touched upon.

13 And then finally, Your Honor, the plaintiffs' -- the
14 separate statutory damages works that are part of the
15 compilations as defined by the Copyright Act.

16 On the plaintiffs' proof of direct infringement, as
17 Your Honor well knows, based both on this, the BMG case and
18 other cases before you, the plaintiffs have to prove, and they
19 don't dispute this, the underlying reproduction or distribution
20 of the works in issue.

21 Unlike in BMG where Rightscorp actually downloaded
22 the full copies of the works from Cox subscribers, here we have
23 no evidence of distribution.

24 Now, the Court, I believe, in BMG didn't need to
25 analyze the reproduction issues since -- given the distribution

1 evidence.

2 Because the record labels chose not to direct
3 MarkMonitor to download copies of the allegedly infringing
4 files -- and they had a contract, they decided advertently not
5 to do that. I'm not blaming them for that, it's their right,
6 but they advertently decided not to do that.

7 As a result of that, Your Honor, the only link, the
8 only link between those files and plaintiffs' works is what
9 plaintiffs have referred to as the so-called cryptographic hash
10 match between the two. And we've talked a little bit about
11 that today.

12 At first blush -- and I must say, when I read this,
13 it seems awfully seductive because it -- if you -- but when you
14 take a step back, as I'm going to ask Your Honor to do for a
15 moment, let me suggest in these circumstances it can be
16 misleading as it relates to the facts before you.

17 The issue for that, and the -- what I would ask Your
18 Honor to talk about -- to listen, is what these hash values --
19 I'm just going to shorten it by referring to it as hash
20 values -- what they represent and what they don't.

21 What they do represent -- and we do not dispute this.
22 Let me just be clear, we do not dispute this. It identifies
23 the files. The files, they can match up one file with another
24 file. Yes, it identifies the files.

25 But what it doesn't do, what it doesn't do, it

1 doesn't indicate a file's file type. It doesn't indicate the
2 contents of the file. It doesn't indicate where the file is
3 originated, whether it was lawful or not. And, fourth, it
4 doesn't -- it doesn't include or say anything about the
5 particular -- whether the particular copy of the file was
6 acquired lawfully.

7 In short, you don't know what is in the files. And
8 let me just -- before I take you through the evidence here, let
9 me explain why it's important. And each of the four protocols,
10 as Your Honor I am sure is aware from reading the papers, have
11 different hash values, whether it's Gnutella or eDonkey or any
12 of those.

13 I would ask Your Honor to just consider the following
14 analogy. The FBI, as we know, has a rich database of
15 fingerprints. And when a crime is being investigated and the
16 FBI is able to dust for fingerprints, they have the ability to
17 go back into their database and to match up the fingerprints.
18 And we know that is powerful evidence because fingerprints
19 match up with fingerprints.

20 What it doesn't do is to say anything about the
21 underlying fingerprints that were actually taken of the person
22 whose fingerprints it is. It says nothing about the underlying
23 foundation. In most instances it doesn't matter because you
24 can find the suspect and make that verification.

25 The reason why I raise this here is because

1 plaintiffs' hash match evidence, we submit, is severely flawed
2 in material respects because there is an insufficient -- I want
3 to take the Court through this -- an insufficient foundation in
4 the record evidence as a matter of law. Foundation is key
5 here, and that's what I'm going to focus on purely in my
6 argument.

7 To illustrate our argument, I would like to take Your
8 Honor through the various steps that plaintiffs outlined -- and
9 we don't dispute these steps by the way -- as the basis for
10 their assertion that the direct infringements have taken place
11 and what we believe to be the uncontroverted evidence showing
12 that plaintiffs' proof of direct infringements is riddled with
13 fault as a matter of law.

14 And I would like to hand up, if I may, a document
15 which I have given to counsel before the argument, which is of
16 the PowerPoint that we're going to exhibit on the screen, to
17 help illustrate this, if I can.

18 THE COURT: Yes, sir. Got it.

19 MR. ELKIN: So there are four steps. And again, we
20 don't disagree what they are.

21 Just to summarize it, if you go to the first slide,
22 this is the step where the -- MarkMonitor trolls the Internet
23 to look for suspecting infringing files. Right?

24 By the way, I am sure, as Your Honor well knows, this
25 has nothing to do in particular with Cox's customers. This is

1 something that they do in trolling peer-to-peer sites to
2 develop an inventory of potentially suspect files.

3 Then what you do is you go to the second step, this
4 is their so-called verification step. This is the step where
5 MarkMonitor goes to Audible Magic and they confirm, hey, this
6 is the suspecting file, it's something you guys have in your
7 database, because if you do we know it belongs to the
8 plaintiffs. Right?

9 The third step, this is the logging step. Once
10 MarkMonitor has gotten the verification, it then logs the data,
11 whatever -- that's, obviously, a subject of debate here. They
12 log that into the MarkMonitor database.

13 And then you go to the fourth step where MarkMonitor
14 actually connects a Cox subscriber. It confirms that the
15 subscriber is infringing. The so-called handshake that
16 everybody is talking about.

17 And those are the steps. And there is a fifth step,
18 of course, the notice step where they actually send the notice.
19 That relates to contributory liability, which I will get to
20 when I get to that argument.

21 So what I would like to focus on in each of these
22 four steps is why there is an insufficient foundation for Your
23 Honor to conclude at this stage that there is direct
24 infringement. If you take a look at the first step, you have
25 to ask yourself, or I would hope the Court would ask itself,

1 where is the proof in the record, beyond conclusory statements,
2 that MarkMonitor has actually done what it says it did rather
3 than just to assume that it did?

4 What do they have? They have pointed to a hard
5 drive, the hard drive of 57,000 some-odd recordings. But the
6 problem is that it lacks foundation because, number one, nobody
7 bothered to even listen to the files.

8 Secondly, plaintiffs didn't produce any reference
9 files of their works in this case. So nothing could be done to
10 actually match this -- the contents of the hard drive to what
11 it is plaintiffs actually claim were infringing. But what we
12 do know, Your Honor, what we do know is that the files on the
13 hard drive were dated 2016 and later.

14 We can conclude on that basis, and there is another
15 point I want to make, but there is no reliable basis to infer
16 that MarkMonitor searched for and downloaded reference copies
17 of the plaintiffs' works in suit, nor were they downloaded in
18 advance of the notices being sent.

19 Now, if we go to step two, this is the verification
20 stage. And we have a number of issues with this particular --
21 with the foundation of this. The first is that there is no
22 evidence in the record that plaintiffs actually lodged original
23 works with Audible Magic to create the referenced library.
24 They say that, but there is no witness that testified, there is
25 no declaration that lays out from the record labels, we are

1 giving to you MarkMonitor, MarkMonitor -- I mean, Audible
2 Magic, I apologize -- Audible Magic has actually received these
3 sound recordings and they have ingested them or any of that.
4 There is just no foundation for it.

5 And we believe that to be -- on that basis there is
6 no reliable mechanism to infer that the files located by
7 MarkMonitor later were matched against plaintiffs' works in
8 suit.

9 Secondly, with regard to this second step here, the
10 only evidence of this match is metadata recorded in the
11 spreadsheets. But as Your Honor knows from reading the papers,
12 the spreadsheet on which plaintiff intends to rely is missing
13 Audible Magic data from before 2015 because they didn't bother
14 to include for the BitTorrent files some 14 out of the 17
15 fields. We don't know what was recorded there.

16 Two, it is an inadmissible summary of the missing
17 Audible Magic data. And I want to pause here and just go over
18 this argument because it's important. It did crop up.
19 Recently Judge Anderson asked you to ultimately deal with this,
20 and it will be part of an in limine motion. But I just want to
21 take Your Honor through it very quickly because it does relate
22 to the foundation issue.

23 As Your Honor well knows, under Federal Rule of
24 Evidence 1006, a summary is admissible to prove the content of
25 voluminous evidence only if the proponent makes the originals

1 available to the other side.

2 What we have here is an extract. We have data from a
3 database. We requested -- we were -- we asked the Court, we
4 asked the other side for it, MarkMonitor for it. We went to
5 court. We got a Court order. It wasn't turned over. We
6 complained about it. And what we have is the so-called '431
7 spreadsheet.

8 And we believe that is a summary in the
9 circumstances. And we believe that the case law is clear that
10 these selective extracts were from a database, and we believe
11 it's a summary.

12 If you take a look at the Branch case, which we have
13 cited, it is a Judge Payne decision from two years ago where
14 there was a spreadsheet selectively compiled from a database.
15 The Court held there that it clearly was a summary that would
16 need to have the underlying database be provided to counsel.

17 Similarly, the District Court in Maryland in the
18 Sprint Nextel case, another case that we cited in our reply
19 brief, indicated that spreadsheets combining data and analysis
20 from different sources were Rule 1006 summaries.

21 And, of course, we know here that the MarkMonitor
22 database -- and this is not really disputed, Your Honor --
23 contained both Audible Magic data as well as whatever
24 MarkMonitor has that we have never been in position to actually
25 inspect. So we think that's a separate problem with respect to

1 this foundation.

2 And then finally here, this '431 spreadsheet was
3 created after the claims period. It was done in 2018 when this
4 case was pending.

5 So we believe on that basis, Your Honor, that there
6 is no reliable basis to infer that the works in suit were
7 matched to the files being shared by Cox subscribers on the
8 peer-to-peer networks.

9 And then finally on the verification step related to
10 this foundation, we know that the evidence packages were
11 assembled without waiting for the verification step. And they
12 say that somehow it existed anyway. But if you look at
13 Barbara Frederiksen-Cross' report, she specifically even admits
14 that.

15 So my -- our conclusion with respect to that is that
16 creates the potential of sending notices on non-infringing
17 works. I know that the plaintiffs probably won't want me to
18 say this, but the truth of the matter is, they had an
19 operational audit. It was done by an independent company, the
20 Stroz Friedberg. They were required to do all of this
21 verification, an audit under the implementation agreements that
22 the record labels had with MarkMonitor and the ISPs that
23 were not -- did not implicate Cox, but were a part of this
24 program. And they said, look, there is a problem. Unless you
25 get this stuff verified before sending notices, there is a

1 potential for notices going out that are faulty.

2 Going to the third step, Your Honor, the so-called
3 logging step. This is the same point I mentioned earlier, the
4 internal database was simply never produced. We believe on
5 that basis there is no reliable basis to infer that this step
6 occurred either.

7 And then finally, the fourth step, the handshake,
8 there are two points here. One is that there is no evidence
9 that any particular peer was actually downloading or
10 distributing the works in suit, at most making available.

11 I know that the plaintiffs aren't happy with the
12 ruling in BMG with respect to Hotaling. We believe it was the
13 right decision. Obviously, we are relying on that. But I have
14 to say that it's disconcerting to suggest that somehow they
15 could not have done more because they could have done more.
16 MarkMonitor actually had a program, and it's in evidence, where
17 they could have, you know, downloaded the works. It would have
18 cost them a little extra money. I don't blame them for not
19 doing it, but they decided not to do it.

20 But they can't somehow, we would suggest, circumvent
21 the law here on the right of distribution simply because of a
22 step that they decided not to take. So on that basis, we
23 believe there is no, again, reliable basis to infer this step
24 occurred.

25 And then finally on this, the accuracy of this match

1 depends on the accuracy of the match in the step two where
2 there was no evidence of the works being lodged in the Audible
3 Magic library. There's an inadmissible summary. There's a --
4 it was done after the fact. There's missing data from before
5 2015. And the evidence packages were asserted without waiting
6 for the verification.

7 So we believe, Your Honor, that the plaintiffs, in
8 essence, would like the Court to take their word for the
9 underlying foundation. But given what's at stake here,
10 Your Honor, I would -- we would urge you not to do that.

11 I do want to turn now to the vicarious infringement
12 argument on direct financial benefit. As to the vicarious
13 infringement claim, our brief addresses so much of the issues
14 that I will not repeat here as to the right and the ability to
15 control the infringing activity.

16 What we think the Court can determine as a matter of
17 law on summary judgment, and what we think is -- we submit is
18 dispositive is that there is no direct financial benefit.

19 The main issue here, as has been articulated, is
20 whether plaintiffs have proved that Cox subscribers were drawn
21 to its service because of the infringing activity alleged in
22 the case. There is no evidence, Your Honor -- we would submit
23 that there's no evidence in the record of this.

24 Plaintiffs have not produced -- they have not
25 produced evidence of a link between the specific infringements

1 at issue, the specific infringements at issue and a financial
2 benefit conferred on Cox.

3 Ellison, despite the argument that you just heard, we
4 would submit, is highly instructive here. This is not some
5 outlier AOL single infringer case. This case, Ellison has been
6 relied on by some 600 federal district courts and circuit
7 courts from and after the time that it -- that holding was
8 announced. It is instructive here and it holds that fixed
9 payments do not satisfy this requirement.

10 And the only exception, the only exception to this
11 general rule is where providing access to the infringing
12 material is a draw to the customers.

13 Plaintiffs have not come forward with any evidence
14 that subscribers were drawn to Cox's service so that they could
15 infringe plaintiffs' works.

16 The plaintiffs argue, and I won't belabor the
17 argument regarding Dr. Lehr, but they argue that Dr. Lehr has
18 shown that Cox's service was a draw because Cox subscribers who
19 received a number of notice -- a larger number of notices on
20 average, paid Cox a few dollars more a month than subscribers
21 who received only a few notices.

22 We would submit for purposes of summary judgment,
23 Your Honor, that this analysis is both irrelevant and wrong for
24 two reasons. First, Lehr did not limit his analysis to
25 subscribers who received notices regarding plaintiffs' works.

1 It went far beyond that.

2 And then secondly, it is undisputed that Cox did not
3 charge any overage fees during the claims period. There is no
4 evidence that higher-paying subscribers chose Cox or chose more
5 expensive data plans in order to illegally access the
6 plaintiffs' work.

7 Plaintiffs' failure, we submit, Your Honor, to come
8 forward with this evidence is really the end of the inquiry
9 under Ellison. Their only response is to urge this Court to
10 disregard Ellison and all of the courts adopting its reasoning,
11 and to hold that a defendant is vicariously liable if it
12 receives multiple e-mails from a copyright owner. That would
13 swallow the rule.

14 And we heard something else just a little while ago
15 having to do with these e-mails, which will be the subject of a
16 motion in limine and potentially at trial. These e-mails have
17 nothing to do with the specific works at issue. To the extent
18 they come into the case, and for whatever reasons they want to
19 tag Cox with, they don't relate to the works in this particular
20 case.

21 I would also note, and I think Mr. Buchanan may have
22 made reference to this, that BMG had even more evidence than
23 plaintiffs do here because they presented an expert survey
24 showing that at least some small portion of Cox subscribers
25 were attracted to the service for the supposed ability to

1 obtain free music. And I think Your Honor permitted them to go
2 to trial on that, and we know what happened there.

3 But plaintiffs didn't even attempt to adduce that
4 evidence here. We don't believe that -- we believe that
5 because plaintiffs cannot prove that Cox derived a direct
6 financial benefit due to the infringements in this case, the
7 Court should reject the plaintiffs' vicarious infringement
8 claim.

9 On contributory liability, I'm going to focus on the
10 actual knowledge element. As both the publisher plaintiffs and
11 so much of the sound recording works in issue that were not the
12 subject of any MarkMonitor notice, we submit that those claims
13 should be decided in Cox's favor as a matter of law with
14 respect to contributory liability.

15 It is undisputed, Your Honor, that all of the notices
16 at issue sent by the RIAA or MarkMonitor on behalf of the
17 record label plaintiffs were sent only on their behalf and did
18 not refer to any music composition. In fact, the RIAA was not
19 even authorized to send notices on behalf of the publishers,
20 and we have their testimony with regard to that.

21 And it is further undisputed, Your Honor, that
22 MarkMonitor notices identified only a portion, a relatively
23 small portion of the sound recordings at use -- at issue. Yet
24 they attempt to hold Cox liable, would like to have the case go
25 to trial on some 10,000-plus works.

1 Here's how they attempt to get around the notice
2 issue. They submit because the actual notice provides a
3 so-called -- let me get this right, "SHA-1 hash number," Cox
4 had the ability to divine that other works must have been in
5 the notice.

6 Respectfully, Your Honor, the convoluted way in which
7 one could figure out from this SHA-1 hash number defies
8 credulity.

9 Let's talk about how plaintiffs believe Cox could
10 have figured this out. The first step, of course, is that Cox
11 receives a notice from MarkMonitor. It has the title, it's got
12 the artist, it's got the file name, and it's got the hash type.
13 And despite the language in the notice that it identifies an
14 authorized copy of a copyrighted sound recording, and those --
15 that's a direct quote, and no other indication that the notice
16 merely identifies a representative work as they now claim, Cox
17 would have to assume that the notice actually gives notice of
18 the alleged additional works.

19 Cox would have to know the hash type information that
20 identified a torrent payload that may or may not contain other
21 of plaintiffs' works. Cox would also have to know that you can
22 search for these torrent payloads by the hash type information.

23 And then after you do that, Your Honor, Cox would
24 then have to download a peer-to-peer file sharing program and
25 search for the hash type information to find the torrent

1 payload.

2 Then they would have to download the torrent payload
3 and then determine whether any of the sound recordings on the
4 payload belonged to the labeled plaintiffs.

5 And then, finally, Cox would have to -- separately
6 have to determine whether any of the music compositions
7 belonged to the publisher plaintiffs.

8 Respectfully, Your Honor, this is an
9 after-the-fact -- at least in our view, an after-the-fact
10 justification that should be seen really for what it is.
11 Which, I would submit, is a last-ditch effort by the plaintiffs
12 to avoid dismissal of contributory claims for the non-noticed
13 works.

14 Briefly on the business subscribers. We submit that
15 the notices to the Cox business subscribers -- which, by the
16 way, Your Honor, it's about 25 percent of all of the notices in
17 this case. So it's not an insignificant number of notices. We
18 believe that they're insufficient as a matter of law to put Cox
19 on notice for contributory liability purposes.

20 Now, as Your Honor well knows, and I think we
21 discussed this in a different context, in the Fourth Circuit
22 BMG opinion, the Court held, "put another way, the proper
23 standard requires a defendant to have specific enough knowledge
24 of infringement that the defendant could do something about
25 it."

1 We would submit, in the case of business subscribers,
2 that Cox is simply not in a position or not situated to do
3 anything about a business subscriber as the relationship
4 between the actual commercial entity and actual infringer may
5 be attenuated at best.

6 We talked -- Mr. Oppenheim referenced the Cobbler
7 case. Frankly, he agrees with the Cobbler case. The problem
8 is that we believe it to be dispositive of the Cox business
9 customers.

10 And by the way, the Cox business customers, the vast
11 majority of those Cox business customers only received a
12 handful of notices, not the tens of thousands of notices that
13 were referenced earlier.

14 We believe the plaintiffs can, at most, show that the
15 alleged infringer signed onto a business network. That they
16 are unable to pinpoint who accessed the potentially public
17 WiFi. And is inconceivable how an ISP would be in a position
18 to do that. We think that the claims for contributory
19 liability as it relates to the Cox business subscriber notices
20 should be dismissed.

21 Lastly, lastly, I realize we're getting on with the
22 day, and I'll be short on this, we're commenting on a couple of
23 points that were raised earlier, if I may.

24 Statutory damages 504(c)(1). I think the statutory
25 damages argument that we're advancing for summary judgment is

1 fairly straightforward. It's based completely, 100 percent on
2 the Copyright Act's language under Section 504(c)(1) and the
3 cases. The MP3 Tunes case and the Capitol Records case. And I
4 understand that they may want to try to get around them, but
5 it's based on established case precedent.

6 We believe that these authorities hold that if you
7 elect to recover statutory damages -- by the way, they weren't
8 forced to seek statutory damages, but they decided to do it.
9 Any parts of a compilation are merged into one work for
10 statutory damages purposes.

11 Now, the plaintiff labels here, Your Honor, chose to
12 register some 6,777 of the works in suit as albums, which falls
13 into the Copyright Act's definition of a compilation, which --
14 for which one statutory damage award is allowed.

15 Even more, Your Honor, as we argue, these albums were
16 registered as a works -- as works for hire. Which is only
17 available when all of the sound recordings covered by the
18 registration are part of the compilation. And the copyright
19 statute, as Your Honor knows, there are specifically delineated
20 areas where you can even claim work for hire. It would have to
21 be either, in this case, for a sound recording, either a
22 collective or a compilation. Collective is considered to be a
23 compilation under the definitional section.

24 There's no dispute here that the 6,777 works were
25 registered as works for hire on 1,158 registrations.

1 Therefore, only predictable as compilations.

2 We believe a straightforward reading of 504(c)
3 mandates that plaintiffs -- if they're successful here, would
4 be entitled to, at most, 1,158 awards.

5 As it relates to the argument the plaintiffs should
6 recover twice, two times for the 2,556 of the music
7 compositions in suit that are also embodied in the sound
8 recordings, again, 504(c)(1) plainly precludes multiple damages
9 awards. That's MP3 Tunes. That's Capitol Records. Their
10 novel and tortured reading of Section 504(c) should be
11 rejected. There's no support for plaintiffs' claim that there
12 is a distinction between single and plural copyright owners.

13 And before I conclude, I just want to make sure that
14 I address some of the comments for efficiency purposes that
15 have been made, and I'll do it very briefly before I sum up.

16 Mr. Oppenheim made a reference to Section -- to '431,
17 that there's a foundation for it. We don't think there's a
18 foundation for it based on 1006 issue.

19 He talks about the Audible Magic sheet as no longer
20 being in the case based on the struck affidavit. Your Honor,
21 we certainly intend to -- if this goes to trial, to discredit
22 that the '431 spreadsheet, by using that.

23 The handshake issue we've addressed. On the analogy
24 that was raised, the teacher analogy about the term paper, I
25 think a better analogy with respect to whether the term paper

1 should be considered to be the same is not whether the --
2 everything was plagiarized, but whether or not the font and the
3 style and the number of pages and the attributes as opposed to
4 the actual content itself, because you can't tell that from the
5 hash evidence.

6 Finally, Your Honor, with regard to the ownership
7 issues on the testimony. There is this concept of best
8 evidence. And I'm not suggesting that there can't be
9 testimony, but where they have actual evidence and they don't
10 turn it over, I question whether or not they've actually met
11 that standard.

12 So, finally, Your Honor, we submit that the case
13 should be disposed of at this stage as the plaintiffs cannot
14 show any of the underlying infringement for the foundational
15 reasons that I attempted to argue.

16 The worst case, it should be stripped down at
17 trial -- for trial to -- simply for the sound recordings that
18 were the subject of actual notices by the relevant label
19 plaintiffs on a contributory liability claim for residential
20 customers where the statutory damages awards per work include
21 all of their constituent and derivative parts.

22 Thank you.

23 THE COURT: All right. Thank you, Mr. Elkin.

24 Yes, sir.

25 MR. OPPENHEIM: Thank you, Your Honor.

1 I often find these arguments sometimes aren't useful,
2 but actually I find -- I found Mr. Elkin's argument to be very
3 useful because as I tick through the issues that he went
4 through, I think it makes clear that the plaintiffs' evidence
5 here is a clear basis for the grant of summary judgment on
6 liability.

7 His -- the PowerPoint presentation he put forward is
8 fundamentally, as he described it, a presentation that
9 plaintiffs have not put forward foundational evidence to
10 support their claims.

11 Your Honor, I don't have an extra copy of it, but it
12 was submitted as part of our summary judgment papers, it's
13 Document 325-6, the declaration of Sam Bahun. I used to say
14 Bahun, I've been corrected. For purposes of the court
15 reporter, it's Bahun. And this declaration, Your Honor,
16 couldn't lay a clearer foundation.

17 Mr. Bahun, who is a senior representative at
18 MarkMonitor, he's been there for years, describes the
19 MarkMonitor process that was used to gather evidence and to
20 send notices. And after he goes through describing it, he then
21 has -- starting on page 7, he goes through the evidence to
22 support or that was generated as a result of the process.

23 So he has a section, infringement notice, and he
24 describes PX 538 and the plaintiffs' number, and what it is,
25 and the foundation for it. He provides a section on notice

1 data, PX 13, PX 14, and he describes the basis for it.

2 Now, Mr. Elkin focused in particular on the spread --
3 the famous '431 spreadsheet, PX 11. Well, Mr. Bahun describes
4 it. He explains exactly what it is. It's an Excel file with
5 47,445 records of digital audio files that, as per the process,
6 described ... And he explains what it is. And he explains
7 that the data was extracted from the MarkMonitor database and
8 produced.

9 There's a section on audio files, PX 39, and he
10 describes that.

11 There's a section on download data, PX 16, and he
12 describes that.

13 And last but not least, a section on case packages.
14 Individual cases, 175,968 different evidence packages collected
15 from the infringement by Cox's subscribers between January 2013
16 and March 31, 2015, and he describes that.

17 There is clearly a foundation for all of the evidence
18 we've put forward in support of our motion for summary
19 judgment. So to the extent that we take Mr. Elkin at his word
20 that their issue with respect to direct infringement is a lack
21 of foundation, we've addressed that.

22 Now, the other issue that Mr. Elkin raised is he
23 claimed that the MarkMonitor data is a 1006 summary. This is
24 an argument that I find interesting because he cites the Branch
25 case. I don't think Mr. Elkin has read the Branch case,

1 because what the Branch case says is, "courts have consistently
2 held that evidence that has been compiled from a computer
3 database is also admissible as a business record."

4 It goes on later citing another case and says,
5 "producing limited data from a larger database is more akin to
6 reviewing a set of documents in response to a discovery request
7 and production -- producing only responsive documents than it
8 is creating a new data compilation or documents for the
9 purposes of litigation."

10 When MarkMonitor produced that spreadsheet, Your
11 Honor, if I gave it to you in totality, and it really was a
12 summary, it would be the world's worst summary because it's
13 massive. And it's -- you've got to have a Sam Bahun to explain
14 it to you, which we do. If that's a summary, it's the world's
15 worst summary. It's -- all it is is an extract of data from
16 the MarkMonitor database.

17 Now, Mr. Elkin complains, well, it was created during
18 the litigation. Well, yeah, they asked for information in
19 discovery. So we pulled the information out of the server.
20 Not a surprise that it's dated when it's dated.

21 So their issues on 1006, just -- it's not there. If
22 we were going to create a summary, Your Honor, and we probably
23 will have to for some kind of demonstrative for trial, it will
24 be a true summary.

25 Mr. Elkin pointed to the fact that there was what he

1 called simultaneous evidence collection. And he's right, but
2 he's wrong. And this is just a detail of how the MarkMonitor
3 system worked. So while it was -- when MarkMonitor found a
4 file that it thought was infringing, while it downloaded that
5 and it sent it off to Audible Magic, MarkMonitor continued to
6 collect evidence about everybody who was distributing that file
7 before it had the confirmation from Audible Magic.

8 Now, it wouldn't do anything with any of that data
9 collection until there was a confirmation from MarkMonitor --
10 or, excuse me, from Audible Magic. If there wasn't a
11 confirmation, it would discard it because it wasn't an
12 infringing file.

13 So the fact that the confirmation happened
14 simultaneously doesn't in some way make the evidence impure or
15 wrong. It's just how the computers worked.

16 Mr. Elkin referred to the Stroz Friedberg audit.
17 It's an audit done in the context of CAS, which has no place in
18 this case and is the subject of a motion in limine. But if it
19 is and we look at the Stroz Friedberg audit, it is an A-plus,
20 double-checked, smiley face report card of MarkMonitor. It
21 couldn't have been a better report. And I would ask that the
22 Court, if it is going to consider it, read it and not take
23 Mr. Elkin's word for what it says.

24 On the issue of vicarious infringement, Your Honor.
25 Mr. Elkin referred to Ellison and said, well, of course, it's

1 good law, it's been relied on by 600 courts. I can't tell you
2 the number of times I've heard Mr. Elkin over the years talk
3 about the Sony Betamax case, including in the BMG appeal. And
4 that was relied on by many, many courts, as he put it, for his
5 articulation of the Sony Betamax case for years until the
6 Supreme Court said, no, no, no, that articulation of Sony
7 Betamax is wrong in the Grokster case.

8 So just because other courts have cited to it doesn't
9 mean that its application in this case should be looked at
10 without regard to the facts. The facts in this case are clear.

11 So we put forward three pieces of evidence in
12 support -- or three types of evidence in support of financial
13 benefit. One I spoke about at length earlier, and that was the
14 fees that were collected from known infringers. Right? Which
15 is akin to saying, I'll let you keep infringing if you pay me.
16 That's a direct financial benefit. And I think that it gets
17 past Ellison easily.

18 But there were two other types of evidence that we
19 put before the Court. And that is, one, Dr. Lehr's study shows
20 that Cox was making more money from heavy infringers, and
21 that's a financial benefit.

22 And, three, we did put forward an argument for draw.
23 Now, Mr. Elkin and Mr. Buchanan said, well, we didn't put
24 forward a study like was done in the BMG case. And that's
25 true, we did not put forward a study. A study is not

1 necessary.

2 If you look at Fonovisa, which is the first draw
3 case, the Ninth Circuit concluded there was a draw based on its
4 review of the evidence and simply saying, of course people were
5 coming to the swap meet for the infringing recordings.

6 And here, of course these subscribers were staying
7 with Cox because they knew that they could continue to infringe
8 on the network without Cox doing anything because they had a
9 sham set of policies with respect to copyright infringement.

10 On the contributory infringement issue, Your Honor,
11 Mr. Elkin went in detail talking about how Cox -- how hard it
12 would have been for Cox to figure out all of the works that
13 were being addressed in each notice. But Mr. Elkin didn't
14 answer the question of why Cox needed to know every work that
15 was the subject of the notice. He didn't answer that because
16 Cox didn't care about that.

17 I mean, frankly, we all know that Cox really didn't
18 care about who was infringing either, but they had to facially
19 at least give the appearance that they did. But certainly as
20 to the infringing files, whether it was a musical composition,
21 it was a movie, it was a sound recording, it was a book, Cox
22 didn't care. Its processes didn't care. It can't now come
23 forward and say, oh, this mattered to Cox. There is no
24 evidence that it mattered to Cox.

25 And certainly the Fourth Circuit doesn't require it.

1 And Mr. Elkin can't point to anything in the Fourth Circuit
2 opinion that says it had to be there.

3 The only thing that Cox needed in order to do
4 something about the infringement was to know who the infringers
5 were. That they got, they got it in spades. They capped it
6 and they blacklisted folks, but the evidence in the summary
7 judgment motion is clear, they got that. They have knowledge.

8 So, Mr. Elkin can say, well, SHA-1, what is that? We
9 couldn't figure it out. That's not the point.

10 And, in fact, what has been lost in the discussion is
11 the restraint that the music industry has exercised in this
12 case. We could have sued on every single work we ever found.
13 We didn't. We sued on only those recordings that were
14 infringed by Cox subscribers who had been the subject of two or
15 more notices after that second notice. We exercised restraint.
16 We didn't simply sue on everything we could.

17 With respect to the business subscriber issue, Your
18 Honor, I think I addressed the Cobbler decision at some length.
19 To be clear, just so the record is clear, I agree with the
20 Ninth Circuit's finding on secondary liability in that case.
21 The direct infringement I don't think we need to speak to here.

22 But what Mr. Elkin raised was an issue outside of
23 Cobbler. And that is to say that under the Fourth Circuit BMG
24 decision, the requirement that they get enough knowledge to do
25 something about it, that with respect to business subscribers,

1 that's not the case. But that's not true. Of course they
2 could do something about it. They are their subscribers. Some
3 of these subscribers -- I mean, they want to say, oh, yeah, it
4 was an ISP in Oklahoma.

5 Yeah, it was also a fraternity house. It was also
6 the gas station that has two people working at it. Right? So
7 they can call them business subscribers and say that they
8 should have a license to infringe, but the law can't allow
9 that.

10 I'm going to allow my colleague, Mr. Zebrak, to
11 briefly address the copyright issues with respect to damages.
12 But one last issue which I didn't touch on in my initial
13 argument, and that is the one -- the affirmative defense of
14 mitigation. And you asked earlier, Your Honor, for me to
15 address only those things that were somewhat different than
16 BMG, and I know I have violated that, but here I actually think
17 this is different.

18 Mitigation in the context of statutory damages is
19 a -- if anything, a factor that can be considered in statutory
20 damages. It's not an affirmative defense. It's not worthy --
21 I mean, we're not at jury instructions, we'll talk about it
22 later. But it's not as though mitigation gets a separate,
23 special jury instruction or special defense.

24 In a statutory damages case, they can argue
25 mitigation as one of the many factors in statutory damages.

1 But it's not -- in a statutory damages case, it is not an
2 affirmative defense, Your Honor.

3 With that, I will leave it to Mr. Zebrak.

4 THE COURT: All right.

5 MR. ZEBRAK: Thank you, Your Honor. Very briefly, I
6 would like to briefly address each of the pair of arguments
7 that Cox raised with respect to statutory damages.

8 THE COURT: Go ahead.

9 MR. ZEBRAK: The first argument is what by shorthand
10 we reference as the album/track argument that they make. Which
11 is that if multiple tracks were ever on the same album and they
12 are in this case, that means there is only one award of
13 statutory damages.

14 Quite frankly, Your Honor, this is not a serious
15 argument. And in a tell of how insubstantial the argument is,
16 Cox in its initial briefing and then again here today didn't
17 brief Your Honor on what the law or the facts are.

18 THE COURT: Well, Mr. Elkin cited the MP3 case and a
19 second case, right?

20 MR. ZEBRAK: Sure. But by that let me explain what I
21 mean. So, first of all, in the BMG case Your Honor recognized
22 correctly that nothing in the Copyright Act bars a plaintiff
23 from recovering a statutory damage award for a sound recording
24 issued as an individual track simply because that plaintiff at
25 some point in time also included that sound recording as part

1 of an album or other compilation.

2 THE COURT: Right. The duplication argument. Go
3 ahead.

4 MR. ZEBRAK: Right. But that was not in Cox's
5 initial papers or its argument today. And I wished to bring it
6 before the Court because Your Honor wasn't the first court to
7 reach that correct result, nor the last court since.

8 The very MP3 Tunes case they rely on from the Second
9 Circuit reaches the same result that Your Honor did, as did the
10 LimeWire case in New York as well. And the reason for that is
11 that what constitutes a work is different than registration.
12 Registration, you know, there are all sorts of different ways
13 that works are protected by registrations. And Cox tries to
14 conflate the two.

15 And Your Honor and other courts, including the Second
16 Circuit, have correctly recognized that where a work is
17 separately distributed as a track, not just as part of an
18 album, separate statutory damage awards are appropriate.

19 Now, rather than address that head on today or in its
20 briefing, Cox ignored it. And instead focuses on what some
21 other courts look to, which is whether a work has independent
22 economic value.

23 Now, we pointed out that these works do have
24 independent economic value, but that's not the sole basis for
25 our argument. It's the fact that these tracks and these

1 compositions -- well, their argument applies with respect to
2 sound recordings. But the point, Your Honor, is that these
3 sound recordings have been commercialized individually. Now,
4 that's the evidence of the case. We put in detailed
5 declarations to that effect.

6 Now, if there wasn't deposition testimony about it,
7 it's because Cox didn't choose to focus on that. Winston &
8 Strawn is well aware that in the digital age these tracks have
9 been commercialized individually. And there is a number of
10 courts that have essentially said that a per-track award is
11 appropriate on this ground.

12 And it's not just our testimonial evidence, which is
13 not -- though they address this just in a footnote in their
14 reply brief, we have multiple paragraphs from our declarants in
15 our opposition to their summary judgment motion explaining that
16 these were commercialized individually.

17 So let me move to the second of the pair of
18 arguments. I know time is tight.

19 Mr. Elkin referred to our arguments as tortured and
20 largely dismissed them, but notably without addressing them,
21 Your Honor. And that I think is reflective of the fact that
22 our argument, we believe, is a plain reading of the statutory
23 text and actually one that, though Cox asks this Court to sort
24 of blindly follow the Second Circuit's non-dispositive
25 decision, the Second Circuit didn't address our argument

1 either. Which is that the plain statutory text indicates in
2 the singular, the copyright owner makes an election.

3 And we think the plain reading of the statute is that
4 the all parts of a derivative work or one work limitation only
5 applies where it's a single owner that owns the derivative work
6 and the underlying work. And I will explain why.

7 First of all, Congress obviously knows how to write
8 in the singular or the plural. And five times in section 504
9 it uses the singular.

10 Now, it's not just that. I noticed this earlier
11 today, but actually in 504(b) it's not just the singular or
12 referring to the infringer, but it refers to him or her. Which
13 is further reenforcing that we're talking about a singular
14 here. It's hard to pluralize him or her with just the addition
15 of an "s."

16 Now, when we made this argument, Cox has never cited
17 a court that rejects our argument. Instead, it cites 1 U.S.C.
18 1, which says, unless the context indicates otherwise, words
19 can be pluralized or from pluralized made to the singular in
20 interpreting a statute.

21 Now, we submit, Your Honor, that the context clearly
22 indicates otherwise. It's not -- you know, the context might
23 not indicate otherwise if there was an interchangeable use of
24 singular or not, but it used it five times. So that's the
25 first thing.

1 The second point, Your Honor, is that to pluralize
2 "copyright owner" here gives it a very different meaning. Now,
3 I understand pluralizing a word, if it just allows for various
4 permutations of the same meaning, but it is a clearly different
5 meaning if in a case like this, when two works are independent
6 -- two works have been infringed, we get one award, that's a
7 very different meaning and not one that we think should just be
8 shooed under the rug based on a statutory provision that says
9 that you have to pay attention to whether the context indicates
10 otherwise.

11 And the third reason why the context indicates
12 otherwise, Your Honor, is something that Judge Rakoff
13 recognized in the TV Tunes decision that we cite in our papers
14 that the MP3 Tunes case disagreed with. Cox refers to our
15 argument in this regard as a policy argument. It's not a
16 policy argument. It's an argument for why the context
17 indicates otherwise.

18 And it's as follows. The statutory damage provision
19 talks about this election being made and all parts of a
20 derivative work being one work for statutory damage purposes.
21 It talks about it in the context of a single action. Cox
22 acknowledges that we could avoid the draconian anti-copyright
23 results that totally stifles the ability of a copyright owner's
24 incentive to create, and all the fundamental logic behind the
25 Copyright Act, that draconian result that they advocate for

1 here, we could avoid that result by bringing separate cases.
2 This is the absurdity that Judge Rakoff pointed out.

3 Now, if Congress intended for something like -- well,
4 first of all, Congress wouldn't -- why would Congress intend
5 for a result that you could separately obtain awards that you
6 couldn't obtain in a single case? It's anti-judicial
7 efficiency. It stifles peoples' ability to protect their
8 works. There is a million reasons why.

9 So for those reasons, we argue that our plain text
10 reading is -- ought not to be dismissed as a tortured reading.
11 It is a correct one, notwithstanding that the Second Circuit
12 didn't address this issue.

13 And, quite frankly, the Second Circuit, what it did,
14 it laid out the statutory provisions. Then what it did, it
15 proceeded to cite a treatise, Patry, which simply cited the
16 derivative work provision. And then it cites legislative
17 history.

18 And Your Honor is well aware about the utility of
19 legislative history in a matter like this. And the legislative
20 history is sparse, there is not much there. And to the extent,
21 you know, one looks at the legislative history -- and we don't
22 think you need to because the plain text, as the rules of
23 construction command, we think is in our favor. Especially in
24 our favor when you recognize that it is an obligation of
25 construction to give meaning to each of the disparate language,

1 and ours is the only one that does that.

2 But if you look at the legislative history, what we
3 think is much more likely is that what Congress had in mind was
4 some scenario where -- and I'm speculating, obviously -- is a
5 scenario where you have, you know, a software company that
6 maybe has three versions of a piece of software, and they own
7 the work and the various components in it.

8 There is no indication that Congress had in mind
9 owners of different types of works, let alone sound recordings
10 and musical works. And we think, again, you don't even need to
11 look at that because the statute is clear.

12 Thank you.

13 THE COURT: Thank you.

14 MR. ELKIN: Your Honor, may I have 60 seconds?

15 THE COURT: You may have three minutes.

16 MR. ELKIN: All right, thank you. I'll try to make
17 good use of it.

18 First of all, shockingly, I actually did read the
19 Branch case.

20 THE COURT: Yeah, I --

21 MR. ELKIN: And I can tell you that the Branch case
22 confirms that even if spreadsheets qualify as business records,
23 such business records are inadmissible if they are summaries
24 under FRE 1006 and the underlying data is not made available.

25 And the Sprint Nextel case also confirms, as it

1 relates to business records, that if spreadsheets are created
2 in anticipation of litigation, and obviously it was here, which
3 select and interpret data, they're not business records.

4 The Fonovisa case is a very important case, but it
5 doesn't focus on direct financial benefit. It focuses on the
6 ability to supervise. I would commend that to the Court's
7 attention.

8 The issue on failure to mitigate and not being a
9 defense. Frankly, there's a lot of discussion and there's some
10 circuits that go one way, there are some circuits that go
11 another. There's a Fifth Circuit case that just got argued,
12 we're waiting for a decision on that particular case. But to
13 suggest that somehow it's part of the Petrella bar is a bridge
14 too far.

15 With regard to the TV Tunes case and Judge Rakoff,
16 happily or unhappily, I was the lead trial attorney in that
17 case in 2001. I made that argument successfully. The
18 MP3 Tunes case in the 2nd Circuit overruled that decision. So
19 there was a lot of discussion about something that has been
20 overruled.

21 The last thing I'll mention before I sit down, and
22 thank you, Your Honor, for your time and indulgence, is the
23 notion that the BMG case before you was about music
24 compositions. It wasn't about sound recordings that were part
25 of or derived out of the music compositions. We're comparing

1 apples to pears.

2 Thank you very much.

3 THE COURT: All right. All right. Well, thank you
4 for your argument today, and it's helped moved our education
5 along. And I'm not going to be making any rulings tomorrow.

6 I see maybe more than I appreciated before today that
7 the motions in limine are intertwined in a lot of the issues
8 that remain outstanding. You know, we'll start moving and
9 trying to make decisions on ones we think we can do safely.
10 We, obviously, have looked at it and saw a need to discuss some
11 of them and not a need to discuss others because the pleadings
12 were so complete.

13 So we'll continue to work on it. We've got a hearing
14 on November 12 with the motions in limine. Are they -- they're
15 not fully briefed yet? Okay. Then we'll -- they're on our
16 radar, but we're -- we'll wait until we get the -- well, we
17 won't wait until the brief -- when's the briefing complete?

18 MR. ZEBRAK: I believe it's November 6, Your Honor.

19 THE COURT: Good. Well, then we have plenty of time
20 to -- well, how many of them are there total?

21 MR. ZEBRAK: Well, the plaintiffs filed one omnibus
22 motion in limine that raises a number of separate issues in it
23 within 30 pages. Cox has filed -- do you know the number?
24 Nine or 10.

25 THE COURT: Okay. All right. Well, we'll get on it

1 sooner than later, and hopefully be prepared to hear argument
2 on that on the 12th.

3 Is there anything else we need to talk about tonight?

4 MR. OPPENHEIM: Can I ask just a -- we're trying to
5 figure out logistics with witnesses for the trial.

6 THE COURT: Yeah.

7 MR. OPPENHEIM: Do you know, Your Honor, whether we
8 intend to sit on Fridays of -- or not at this point?

9 THE COURT: So we've been talking about that a little
10 bit, and I'm probably going to put you all on the clock. And I
11 think we talked about two weeks of trial testimony when we
12 were -- bless you. When we -- or at least two weeks. And I
13 think -- you know, I don't have anything else going on, except
14 for our holiday, which is about -- day four they'll be asking
15 about when are we going to be done because the holidays are
16 coming up.

17 So, you know, why don't you all see if you can work
18 together on how many days you think you each need. I may do --
19 I may cut down my Friday dockets and start at 11:00 instead of
20 starting at 9:00. But I think, given the holidays, we're going
21 to go on Fridays as well, unless something that really requires
22 my attention comes up. So that's the plan.

23 MR. OPPENHEIM: Very well. And when you say put us
24 on the clock, you mean like a chess clock of time?

25 THE COURT: Yeah. You can each have four days, you

1 know, something like that.

2 MR. OPPENHEIM: I thought we had actually said that
3 we --

4 THE COURT: Yeah, gone farther than that?

5 MR. OPPENHEIM: I thought we had concluded it was
6 going to take us three weeks total, but I'm not sure we had
7 settled on that. But we'll discuss it, obviously, Your Honor.

8 THE COURT: Yeah.

9 MR. OPPENHEIM: And none of us want to be driving
10 into the holidays that far if we can avoid it.

11 THE COURT: Yeah. Well, keep -- you know, obviously,
12 a lot of repetition is not going to be permitted. And you need
13 to -- and, you know, some of these rulings will help focus the
14 case. And I realize you've got to wait for those before you
15 have your final trial strategy set.

16 So -- but keep looking at what you need versus what
17 you don't need. All right.

18 MR. OPPENHEIM: Very well. Thank you, Your Honor.

19 THE COURT: Okay. All right. Well, thank you all.

20 Have a good evening and we're in recess.

21 -----
22 HEARING CONCLUDED

23 I certify that the foregoing is a true and
24 accurate transcription of my stenographic notes.

25 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR